Liminal Immigration Law

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ABSTRACT: Liminal immigration rules operate powerfully beyond the edge of traditional law to govern the movement of people across borders and their interactions with the immigration system within the United States. This Article illuminates this body of "liminal law," revealing how agencies and advocates have innovated to create widely followed rules that operate like traditional legal rules but are not. These rules are law-like, or liminal, in that they stand apart from "hard" law like statutes, regulations, or judicial opinions, but exert a similar authority. Because of their liminal nature, these rules lead a precarious existence and are often in transition, tending either toward codification or toward extinction. They are nonetheless sticky, resisting their own demise. The Article employs case studies of three liminal rules—the Deferred Action for Childhood Arrivals program, the mandatory immigration detainer, and administrative closure—to illustrate the characteristics and the potency of liminal immigration law.

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INTRODUCTION

Liminal immigration rules—potent mandates that are poised between formal law and informal norms—are central to many of the most impactful developments in immigration law in the last several decades. In 2017, President Trump struck a blow to a popular—and precarious—innovation in immigration governance called Deferred Action for Childhood Arrivals ("DACA") that protected nearly 800,000 undocumented resident youth from

the threat of deportation.[1] Dismantling DACA seemed simple for an incoming president who could merely undo what had been done to create DACA: announce the change from the White House and issue an agency memo to implement the announcement.[2] In fact, a similar program for parents of U.S. citizens and lawful permanent residents had withered after a district court judge enjoined it in 2015.[3] Yet DACA outlived the Trump Administration. It remained, in every meaningful manner, just as it was when Trump took aim at it in 2017.[4] Trump targeted DACA because it was extraordinarily effective at staving off mass deportation.[5] It survived because, despite its fragility, it was unexpectedly sticky.[6] Its ephemeral appearance belied its tensile core.

DACA established a liminal legal rule, a potent command not to deport those within its protection. Liminal law is not positive law. It lacks the formality of traditional legal rules like statutory law, common law, and administrative rulemaking, yet it operates in ways that are at least as powerful. At the same time, liminal law is gossamer and vulnerable to destruction. Despite the fragility of its appearance, liminal law is sticky, withstanding assault without appreciable change. Liminal rules are also, by their nature, in perpetual transition: moving either toward formal recognition as legislation, regulation, or precedent, or in the opposite direction toward elimination.

This Article divines the characteristics of liminal laws through an examination of three transformative moments in immigration law that created three powerful liminal legal rules. First, the DACA program created a form of lawful presence for a class of undocumented noncitizens, essentially by establishing a liminal rule protecting them from deportation. Its power lay in conferring on recipients the attributes of legitimacy—authorization to work, access to valid identity documents, freedom of movement within the United States, and temporary immunization from deportation—transforming these individuals' immigration status from "undocumented" to a recognized, documented presence.[7] The result was a precarious protection from

1. Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017, 9:05 AM), https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act [https://perma.cc/JM8Y-763R]; Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children [https://perma.cc/697N-B3DR] (reporting that seventy-four percent of U.S. adults favor granting "legal status to immigrants who came to the [United States] . . . as children").

2. *See infra* Section I.B.1.

3. *See* Texas v. United States (*Texas I*), 787 F.3d 733, 734 (5th Cir. 2015); Texas v. United States (*Texas II*), 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

4. *See infra* Section I.B.1.

5. *See infra* Section II.A.1.

6. *See infra* Section II.B.1.

7. *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 719 (2015) [hereinafter Chacón, *Producing Liminal Legality*]; Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1134 (2015).

deportation that provided those that held it with a precarious intermediate status.[8]

The second liminal legal rule arose from an immigration enforcement operation called "Secure Communities."[9] Secure Communities instituted a nationwide practice by Immigration and Customs Enforcement ("ICE") agents of issuing immigration "detainers" that convinced state and local officials to prolong their custody of targeted arrestees solely for immigration enforcement purposes.[10] Secure Communities relied on a liminal legal rule: that the ICE detainer imposed a mandatory obligation on state and local law enforcement officials to continue to hold an individual in custody.[11] The power of this liminal rule resided in the authority that a government form seemed to impart permitting the police to bypass the usual requirements of probable cause or a hearing.

Third, the use of administrative closure of immigration cases as a form of relief from removal constitutes a different type of liminal rule.[12] Following a legislative legalization of unauthorized residents in 1986, immigration courts employed administrative closure to stave off deportation for tens of thousands of long-term residents and clear the way to legalization.[13] Through this practice, the power of an immigration judge to administratively close a deportation matter—in the absence of explicit statutory authorization—coalesced into a liminal rule. That rule prioritized pathways to stable immigration status over avenues to deportation.

DACA, the so-called mandatory immigration detainer, and administrative closure are but three examples of liminal legal rules. This Article highlights them as examples of liminal law, because they have drawn public and professional attention and illustrate the profound impact liminal immigration law can have. Liminal rules make indentations in the operation of immigration law,

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8. *See* Edelina M. Burciaga & Aaron Malone, *Intensified Liminal Legality: The Impact of the DACA Rescission for Undocumented Young Adults in Colorado*, 46 L. & SOC. INQUIRY 1092, 1100–02 (2021) (reporting the results of a study of DACA recipients' sense of the precarity of their status).

9. News Release, U.S. Immigr. & Customs Enf't, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008), https://www.aila.org/File/DownloadEmbeddedFile/51484 [https://perma.cc/H68S-8C72]; *see* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154–63 (2013) [hereinafter Lasch, *Rendition Resistance*] (providing an overview of the Secure Communities program).

10. *See* U.S. IMMIGR. & CUSTOMS ENF'T, ICE DETAINERS: FREQUENTLY ASKED QUESTIONS (2011), https://www.ice.gov/identify-and-arrest/detainers/ice-detainers-frequently-asked-questions [https://perma.cc/UEQ8-ZRRV] ("Detainers are critical for ICE to be able to identify and ultimately remove criminal aliens who are currently in federal, state or local custody."); *see also* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1270 (2015) [hereinafter Stumpf, *D(e)volving Discretion*] (describing detainers as an enforcement tool).

11. *See generally* Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431 (2021) (describing a case study of a multifaceted campaign against Secure Communities); *see infra* Section II.B.2.

12. *See infra* Section I.B.3.

13. *See infra* Section I.B.3.

compel action, constrain conduct, and channel discretion. Because liminal rules are by and large easier and faster to create than immigration statutes or regulations, they are more adept at entering liminal spaces. They create flexibility in immigration law when pressure for legal change mounts, but traditional avenues of legal revision are ossified. Their legitimacy is open to contest, as is apparent from the political storm around DACA, the legion of lawsuits challenging the detainer, and the attempts to do away with administrative closure.[14] It is this contested legitimacy of liminal rules and their resilience in the face of challenges that leads to their transitional nature, as they are pushed or pulled from more to less substantial states and back again.

Liminality in immigration law is at the cutting edge of the new functionalism in immigration scholarship, building on sociologist Cecilia Menjívar's groundbreaking work on liminal legality[15] and Luin Goldring's description of the "precarious status" of noncitizens without sanctioned permanent residence.[16] Jennifer Chacón has elegantly described how immigration law can produce liminal legal subjects, such as DACA recipients, who slip "in and out of protective states of administrative grace" in which they are protected from criminal and immigration enforcement but remain "structurally . . . 'invisible,'" "neither here nor there."[17] These liminal legal subjects are, as a result of their invisibility, vulnerable to forms of marginalization that are themselves less visible and so less accountable.[18] Geoffrey Heeren has defined "nonstatus,"[19] a legally ambiguous state in which the government recognizes an otherwise unauthorized individual's presence

14. *See infra* Part III.

15. *See* Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. IMMIGR. L.J. 567, 575–76 (2021) (discussing "Menjívar['s] . . . concept of 'liminal legality,'" and the frequent periods of uncertainty regarding immigration status for immigrant communities with temporary protected status (citing Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1015–16 (2006))); Heeren, *supra* note 7, at 1125 (detailing how migrants awaiting visa approval but able to obtain work authorization operate in a "twilight status"); Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 770–71 (2017) (describing how immigration laws operate to promote immigration status "conversion," "passing," and "covering"). *See generally* Cecilia Menjívar & Susan Bibler Coutin, *Challenges of Recognition, Participation, and Representation for the Legally Liminal: A Comment*, *in* MIGRATION, GENDER AND SOCIAL JUSTICE: PERSPECTIVES ON HUMAN INSECURITY 325 (Thanh-Dam Truong et al. eds., 2014) (discussing the liminal legality of migrants as workers and how that liminality affects their access to justice and equality).

16. *See* Luin Goldring, Carolina Berinstein & Judith K. Bernhard, *Institutionalizing Precarious Migratory Status in Canada*, 13 CITIZENSHIP STUD. 239, 240 (2009); Luin Goldring & Patricia Landolt, *The Conditionality of Legal Status and Rights: Conceptualizing Precarious Non-Citizenship in Canada*, *in* PRODUCING AND NEGOTIATING NON-CITIZENSHIP: PRECARIOUS LEGAL STATUS IN CANADA 3, 3 (Luin Goldring & Patricia Landolt eds., 2013).

17. Chacón, *Producing Liminal Legality*, *supra* note 7, at 715–16 (alteration in original) (first quoting VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 95–96 (1967); and then quoting VICTOR W. TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 95 (1969)).

18. *Id.*

19. Heeren, *supra* note 7, at 1129–33.

in the country.[20] Joining DACA as examples of nonstatus are parole,[21] deferred enforced departure,[22] and temporary protected status.[23] Finally, Nina Rabin has mapped "a 'spectrum of [legal] precarity.'"[24] She describes the subordinating effect of the legal limbo of liminal status, illuminating how "legal backlogs" consign those with liminal status to "an extremely limited life at the margins of society."[25]

These scholars have evocatively mapped the liminal status of noncitizens. This project builds on their valuable contributions to identify liminal rules that shape not just liminal status, but the larger tapestry of the governance of migration in the United States. This Article defines liminal law and explores its effectiveness and persistence. It explains how liminal law responds to changes in policies, practices, and evolving understandings of membership. Despite the calcification of statutory immigration law, liminal law allows the law on the ground—operative immigration law—to flex and sway. Despite its apparent fragility, liminal rules are structurally sound enough to stand against attempts to eliminate them.

The Article makes two critical contributions beyond articulating the concept of liminal immigration law. First, it traces the origins of liminal immigration law and defines its characteristics. These liminal rules arise when agencies, courts, and advocates innovate at the edges of their delegated power, creating new rules that shape agency authority in new ways. We use the liminal rules embedded in DACA, the detainer, and administrative closure as case studies to apply these characteristics and show how liminal rules have powerfully shaped our current immigration landscape. Second, we lay liminal law alongside traditional forms of law to gain insight into the composition of

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20. *Id.*

21. *Id.* at 1134–36 (describing parole as a program designed to provide individualized relief in sympathetic cases but not bestow an immigration "status"); *see* Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5)).

22. Heeren, *supra* note 7 at 1129–32 (describing deferred enforced departure as assent from the U.S. government to remain in the United States and legally work, without conferring formal immigration status); *see also* 8 C.F.R. § 241.6 (2022) (defining requisites for an administrative stay of removal).

23. 8 U.S.C. § 1254a(b)(1) (2018), McCarran-Walter Act § 244(b)(1); *see* Heeren, *supra* note 7, at 1140 (explaining that DHS can temporarily protect from deportation "nationals of any foreign state . . . experiencing civil strife, environmental disaster, or other extraordinary conditions" when removal "would pose a serious threat to their safety"); *see also* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 264–65 (2010) [hereinafter Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*] (tracing the development of deferred enforced departure, extended voluntary departure, and temporary protected status); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–9, 24 (2014) (noting that ICE may use prosecutorial discretion to issue supervision orders instead of enforcing an order of removal).

24. Rabin, *supra* note 15, at 572–73.

25. *Id.*

law itself. We also lay bare the implications of a set of influential rules that exists only liminally, rules that operate with broad practical impact but less transparency and substance than traditional law.

Part I traces the formation of liminal immigration law.[26] It explains how the ossification of traditional forms of immigration law and pressures for change from both the immigrant community and the enforcement agencies inspired the innovations of liminal rules.[27] This Part then describes the appearance of three unlikely legal reforms, the attempts to undo them, and the story of their survival.[28]

Part II introduces the defining characteristics of liminal law and shows how they manifest in three significant case studies: DACA, the Secure Communities program, and the administrative closure rule that immigration courts employ as a soft form of relief from removal.[29] Through these examples, this Part will demonstrate how liminal law can be at the same time robust, precarious, sticky, and in flux.

Part III explores what liminal law can tell us about the substance and value of law. It suggests that the existence and scope of liminal law reflect the racialization of immigration law.[30] It begins by locating liminal law in the lexicon of legal rules. It then theorizes how liminal law arises, why it exists and persists, and who it impacts.[31] This Part posits that liminal law's operation reflects a racialized division of the power and stability of legal rules.[32] Finally, it suggests that liminal law is more widespread in immigration law than the three examples we provide here and points toward other areas of law where liminal rules may operate.[33]

I. THE ORIGINS OF LIMINAL IMMIGRATION LAW

Liminal immigration law arose when traditional avenues for reforming immigration law ossified. This Part describes how intense pressure for immigration policy change due to political discord over immigration and the criminalization and racialization of immigration policing, combined with the vacuum created by statutory immobility, led to the formation of liminal legal rules. After describing the barriers to the development of traditional law, this Part sets out three liminal legal rules that have had major impacts on the regulation of migration in the United States.

26. *See infra* Part I.
27. *See infra* Part I.
28. *See infra* Part I.
29. *See infra* Part II.
30. *See infra* Part III.
31. *See infra* Part III.
32. *See infra* Part III.
33. *See infra* Part III.

A. THE OSSIFICATION OF TRADITIONAL IMMIGRATION LAW

Immigration law in the United States has ossified. The lack of contemporary immigration legislation contrasts sharply with the extraordinary scope of power and judicial deference that Congress enjoys when legislating immigration policy.[34] Congress has historically had a lively interest in wielding that immigration superpower, fashioning and re-fashioning the immigration laws in response to major shifts in U.S. society.[35] In the 1920s, amidst an economic depression and growing isolationism from international affairs, Congress responded to waves of immigration from southern and eastern Europe with legislation intended to attain a white, Anglo-Saxon population.[36] In 1921, Congress imposed admissions quotas to selectively constrict migration based on country of origin.[37] It revised those laws three years later in an attempt to replicate the northern European demographics of the 1890 census.[38] In combination with the nineteenth century Asian exclusion laws, the quota legislation resulted in admissions policies that heavily favored immigration from the United Kingdom.[39]

World War II and the Cold War inspired a flurry of legislative reworkings of immigration law. War in the 1930s and 1940s led to a comprehensive nationality code,[40] preventing the admission of "dangerous" aliens,[41] repealing Chinese exclusion laws in favor of quotas,[42] and funding the Bracero Program that brought Mexican laborers into the agricultural fields of

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34. *See* Chae Chan Ping v. United States, 130 U.S. 581, 604, 609 (1889) (declaring that Congress had broad plenary power to regulate immigration law rooted in the nation's sovereignty that required judicial deference to the political branches); Fong Yue Ting v. United States, 149 U.S. 698, 711–13 (1893) (extending the plenary power to deportation); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 587–91 (1952) (finding that expulsion "is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state"); Arizona v. United States, 567 U.S. 387, 394–95 (2012) ("The . . . United States has broad, undoubted power over the subject of immigration and the status of aliens.").

35. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 126 (2006) [hereinafter MOTOMURA, AMERICANS IN WAITING].

36. *Id.*

37. Act to Limit the Immigration of Aliens into the United States (Emergency Immigration Act), Pub. L. No. 67-5, ch. 8, 42 Stat. 5, 5–6 (1921) (repealed 1952).

38. *See* Immigration Act of 1924 (Johnson-Reed Act), Pub. L. No. 68-139, 43 Stat. 153, 153–54 (repealed 1965); *see also* OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, THE IMMIGRATION ACT OF 1924 (THE JOHNSON-REED ACT), http://history.state.gov/milestones/1921-1936/immigration-act [https://perma.cc/MHM8-QEGZ] (concluding that preserving racial and ethnic homogeneity was the central purpose of the 1924 Act).

39. MOTOMURA, AMERICANS IN WAITING, *supra* note 35, at 127.

40. *See generally* Nationality Act of 1940, Pub. L. No. 76-853, ch. 876, 54 Stat. 1137 (1940) (codified in scattered sections of 8 U.S.C., 48 U.S.C., 50 App. U.S.C.) (repealed 1952) (introducing a comprehensive immigration code).

41. Wartime Measure of 1941, Pub. L. No. 77-113, 55 Stat. 252, 252 (repealed 1942).

42. *See* Chinese Exclusion Act Repeal (Magnuson Act of 1943), Pub. L. No. 78-199, 57 Stat. 600, 600 (1943) (codified at scattered sections in 8 U.S.C. §§ 262–99).

the United States.[43] In the 1950s, fear of communism drove Congress to expand political grounds for excluding and expelling noncitizens.[44]

The civil rights activism of the 1960s[45] and geopolitical concerns that racial discrimination was negatively impacting foreign policy during the Cold War[46] led Congress to strip overt racial distinctions from the Immigration and Nationality Act ("INA"). During the 1960s and 1970s, legislation newly recognized refugees and provided for their admission.[47] Throughout, Congress reformed the precarious status of many noncitizens by permitting them to obtain lawful permanent resident status through formally registering their presence in the country.[48]

The two decades after the 1970s saw a new trend in immigration legislation. In 1986, the Immigration Reform and Control Act ("IRCA")[49] exchanged a formal amnesty for many unlawfully present people for a significant

43. *See generally* Farm Labor Appropriation Act of 1943, Pub. L. No. 78-45, 57 Stat. 70 (providing funding to support an adequate supply of agricultural workers); Agricultural Act of 1951, Pub. L. No. 82-78, 65 Stat. 119 (amending the Agricultural Act of 1949); *see also* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 20–27 (1992) (reporting that the Bracero Program initially began as a binational agreement between the United States and Mexico before Congress officially endorsed the Program in Public Law 45 in 1943).

44. Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 212(a), 66 Stat. 163, 182–85 (codified as amended at 8 U.S.C. § 1182); *see also* Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 56–70 (1987) (observing that the McCarran-Walter Act attempted to include nearly every ideological belief that might be subversive for the purpose of excluding and expelling noncitizens).

45. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 201(e), 79 Stat. 911, 911 (1965) (codified as amended at 8 U.S.C. §§ 1151–52); Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 371 (2012); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 227 (2004); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 225 (2007).

46. David S. FitzGerald & David Cook-Martín, *The Geopolitical Origins of the U.S. Immigration Act of 1965*, MIGRATION POL'Y INST. (Feb. 5, 2015), https://www.migrationpolicy.org/article/geopolitical-origins-us-immigration-act-1965 [https://perma.cc/38V6-897H] (concluding that "[t]he shift away from ethnic selection in U.S. immigration policy was primarily a response to foreign policy pressures emanating from the growing number of independent Asian, African, and Latin American countries that sought to delegitimize racism" during World War II and the Cold War).

47. *See* Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, 401; Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121, 121–22; Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87, 87–88 (codified at 22 U.S.C. § 2601); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections in 8 U.S.C.).

48. 8 U.S.C. § 1259; *see also* ANDORRA BRUNO, CONG. RSCH. SERV., RL30578, IMMIGRATION: REGISTRY AS MEANS OF OBTAINING LAWFUL PERMANENT RESIDENCE 1–4 (2001) (discussing the legislative history of § 249 in the Immigration and Nationality Acts).

49. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–61 (codified at 8 U.S.C. § 1324(a)).

expansion of immigration policing tools.[50] Major immigration statutes after IRCA continued to expand enforcement, interwove immigration and criminal law, and restricted avenues for relief from deportation.[51] In sum, until the turn of the twenty-first century, Congress regularly responded with new immigration legislation to social upheaval, economic shifts, and political and demographic factors.

After the turn of the century, legislation braked and halted. With isolated exceptions, Congress passed no meaningful immigration legislation after the wave of legislation in the mid-1980s and the 1990s.[52] Despite a series of unsuccessful efforts to pass statutory immigration reform,[53] no immigration

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50. *See generally id.* (conferring lawful permanent residency on millions of undocumented residents, instituting employer sanctions for hiring unauthorized employees, and criminalizing some immigration-related conduct).

51. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 216, 100 Stat. 3537, 3537–42 (codified as amended in scattered sections of 8 U.S.C.) (criminalizing evading immigration laws through marriage); Immigration Act of 1990, Pub. L. No. 101-649, § 121, 104 Stat. 4978, 4994 (codified at 8 U.S.C. § 1325) (criminalizing the establishment of a commercial enterprise for the purpose of evading immigration laws); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C., tit. I, § 108(b)(1), 110 Stat. 3009-546, 3009-557 (codified at 18 U.S.C. § 758) (criminalizing fleeing an immigration checkpoint at excessive speed). *See generally* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified at scattered sections in 8 U.S.C., 18 U.S.C., 28 U.S.C., 34 U.S.C.) (reforming habeas and criminal procedures, including immigration ones); *see also* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1846, 1848 (2007) [hereinafter Chacón, *Unsecured Borders*] (noting that AEDPA and IIRIRA "expanded the category of criminal aliens . . . [to] sweep[] in many non-citizens formerly ineligible for removal" and also "increasing prosecution of immigration" offenses); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 8–11 (2d ed. 2021) [hereinafter GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW] (noting that throughout the 1980s and 1990s, Congress expanded crime-based removal grounds, added immigration-related crimes to the federal penal code, and increased resources for federal prosecution of immigration-related crimes); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1728 (2011) [hereinafter Stumpf, *Doing Time*] ("The sanctions scheme for immigration violations now often imposes deportation following incarceration . . . .").

52. *See supra* notes 49–51. Even the Homeland Security Act of 2002 made little substantive change. Its main goal was to reorganize immigration-related duties among three new Department of Homeland Security agencies. *See* 6 U.S.C. § 291(a) (abolishing the INS); *id.* § 271(a) (establishing Bureau of Citizenship and Immigration Services); *id.* § 211 (establishing U.S. Customs and Border Protection); *id.* § 252 (establishing Bureau of Border Security, later changed to Immigration and Customs Enforcement). The USA PATRIOT Act in October 2001 and the REAL ID Act in 2005 heightened requirements for identification documents and restricted judicial review of agency immigration adjudication but expanded neither immigration benefits nor enforcement tools. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. 107-56, § 412, 115 Stat. 272, 350–52 (codified at 8 U.S.C. § 1226a); REAL ID Act of 2005, Pub L. No. 109-13, div. B, tit. I, § 106, 119 Stat. 302, 310–11 (codified at 8 U.S.C. § 1252).

53. *See* Howard S. Myers, III, *America's Immigration Policy—Where We Are and How We Arrived: An Immigration Lawyer's Perspective*, 44 MITCHELL HAMLINE L. REV. 743, 763–73 (2018); RUTH ELLEN WASEM, ANDORRA BRUNO, WILLIAM J. KROUSE & LARRY M. EIG, CONG. RSCH. SERV., IB10044, IMMIGRATION LEGISLATION AND ISSUES IN THE 106TH CONGRESS 1 (2000); RUTH ELLEN WASEM, CONG. RSCH. SERV., RS22574, IMMIGRATION REFORM: BRIEF SYNTHESIS OF ISSUE 1 (2007).

legislation made major changes to admissions or relief from removal.[54] The IRCA marked the last legislative moment that significantly expanded opportunities to enter lawfully or that regularized the status of noncitizens unlawfully present in the United States.

As immigration legislation ossified, pressure mounted for immigration reform, leading to recurring calls for a major statutory overhaul.[55] The population of unauthorized residents grew significantly after the INA. With the same hand that Congress used to strip out racial selection from immigration law, it had for the first time placed stringent limits on migration within the Western hemisphere.[56] Even as the rate of growth steadied, the passage of time froze the precarious status of undocumented residents and their communities within the United States.[57] A progressively increasing share of the unlawfully present population fell under the expansive "crimmigration" laws of the last wave of enforcement legislation.[58] Undocumented youth, coming of age as Americans outside of the law,[59] found powerful ways to tell their story through social and political activism.[60] These dynamic forces advocating for social transformation rubbed up against the calcified channels for traditional legal change.[61]

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54. *See* Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 63 (2016) [hereinafter Family, *The Executive Power*] (observing that a "stalemate" over immigration reform has increased executive power in immigration law). *See generally* Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (codified in scattered sections of 8 U.S.C.) (requiring creation of a data system to determine admissibility or deportability of noncitizens and share data among law enforcement and immigration agencies); Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (expanding surveillance systems and border fencing).

55. *See, e.g.*, *About Us*, REFORM IMMIGR. FOR AM., https://reformimmigrationforamerica.org/about-us [https://perma.cc/W7YE-RQEU]; Stephen Stock & David Paredes, *Immigration Court Director Calls for Overhaul of Broken System*, NBC BAY AREA (May 27, 2015, 11:52 PM), http://www.nbcbayarea.com/investigations/Immigration-Court-Director-Calls-for-Overhaul-of-Broken-System-305053461.html [https://perma.cc/462P-7LV2]; Julia Preston, *The Big Money Behind the Push for an Immigration Overhaul*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/15/us/obama-immigration-policy-changes.html? [https://perma.cc/N7TQ-MARX].

56. *See Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/hispanic/interactives/unauthorized-trends [https://perma.cc/MPF4-63ZL] (showing a steady increase from 3.5 million unauthorized immigrants in the United States in 1990 to 12.2 million in 2007 and a subsequent slight decline).

57. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 145–65 (2014) [hereinafter MOTOMURA, IMMIGRATION OUTSIDE THE LAW] (describing methodologies of integration).

58. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381–86 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*]; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 631–35 (2012) [hereinafter Chacón, *Overcriminalizing Immigration*].

59. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 57, at 29.

60. *See generally* WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE (2013) (tracing the political awakening and activism of undocumented youth).

61. *See id.* at 99 (describing the defeat of the DREAM Act despite a favorable political climate).

At the same time, the advent of crimmigration law and the prioritization of immigration enforcement drove a massive increase in the size of the enforcement agencies, an expansion of their duties, and a new relationship between state and local criminal law actors and immigration enforcement actors.[62] These changes similarly exerted pressure for new developments in immigration law.

Why did statutory change in immigration policy ossify despite such widespread pressure for reform? While a comprehensive analysis is beyond the scope of this Article, several reasons present themselves that relate to the development of liminal law. First, immigration became a front-burner political issue at a moment when the national political parties were experiencing enduring obstacles to bipartisan agreement.[63]

Second, the intertwining of immigration and criminal law in the modern era conflated the unlawfully present noncitizen with the "criminal alien,"[64] complicating efforts at reform. In the 1980s and 1990s, rhetoric about immigrants increasingly tied immigration to national security and criminalization.[65] Congress restricted relief from deportation and punished unauthorized border crossing by barring lawful re-entry for periods of three or ten years or longer.[66] It expanded grounds for inadmissibility and deportability to include almost all crimes except non-drug-related, single misdemeanors.[67]

This increasing association between immigrants and crime was racialized. The trope of the "illegal alien" was strongly associated with Latinos, particularly Mexican citizens.[68] Latinos were being deported and detained at much higher rates than any other ethnicity.[69] Whether these rates mirrored actual rates of

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62. *See* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 598–606 (2012) [hereinafter Chacón, *The Transformation of Immigration Federalism*].

63. *See* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1463–83 (2012) (identifying the influence of "issue entrepreneurs," party polarization, conflation of terrorism and immigration, and nativist sentiment as obstacles to bipartisan immigration reform).

64. *See* Stumpf, *The Crimmigration Crisis*, *supra* note 58, at 419.

65. *See id.*

66. *See* Chacón, *Overcriminalizing Immigration*, *supra* note 58, at 618.

67. *See* Stumpf, *The Crimmigration Crisis*, *supra* note 58, at 382–84.

68. Ted Brader, Nicholas A. Valentino & Elizabeth Suhay, *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. POL. SCI. 959, 959, 967–69 (2008) (concluding that media reporting about the costs of immigration boosts white support for restricting immigration far more when the media features Latinx immigrants than when it depicts European immigrants); Scott Clement, *The Data on White Anxiety Over Hispanic Immigration*, WASH. POST (Aug. 14, 2014, 9:27 AM), https://www.washingtonpost.com/news/storyline/wp/2014/08/14/the-data-on-white-anxiety-over-hispanic-immigration [https://perma.cc/XD8G-CA5V].

69. *See* Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666 (2011) [hereinafter Vázquez, *Perpetuating*] ("[I]n . . . 2009, Latinos accounted for approximately 94% of . . . removals as well as the total number of noncitizens removed for criminal violations."); Yolanda Vázquez, *Race and Border Control: Is There a Relationship?*, BORDER CRIMINOLOGIES (Apr. 6, 2015),

immigration law violation or selective enforcement or structural bias,[70] the effect was that the face of the immigration violator in the public mind was Latino.

The expansive statutory framework for crimmigration, along with the strong association between the criminal alien and disfavored groups, drained political will.[71] It stymied legislative change that would expand immigration status or strengthen legal protections for noncitizens or racial groups identified with immigration.[72] In this way, crimmigration legislation led both to halting statutory change and to dampening political will to reform an immigration system now clouded by this association with crime. Crimmigration also intensified calls from those experiencing its effects for new approaches in immigration law and policy.[73]

Other traditional avenues for development of law besides legislation—formal rulemaking and administrative decision-making—also encountered stiff opposition and reversal. Notice-and-comment rulemaking became contested

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https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/04/race-and-border [https://perma.cc/8AME-YDF2] ("Approximately [ninety-four] percent of those removed, [ninety] percent of those in immigration detention, and [ninety-four] percent of those removed for criminal violations are Latinos . . . ."); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 74 (2019) [hereinafter GARCÍA HERNÁNDEZ, MIGRATING TO PRISON]. This trend continued. *See* U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 26–32 (2020) [hereinafter USCIS 2020 ENFORCEMENT AND REMOVAL REPORT], https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf [https://perma.cc/NDC2-2F43] (indicating that ninety-four percent of removals from FY2018 to FY2020 were of migrants of Latinx origin).

70. *See* Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L. REV. 463, 466, 475–77 (2022) (collecting studies showing racial profiling as a result of a program deputizing local law enforcement officers as immigration agents, and examining eighteen million traffic stops showing that the program led state troopers throughout North Carolina and South Carolina, who were not signatories to the program, to stop Hispanic drivers more frequently than white drivers, disproportionately funneling Hispanics into the deportation system).

71. *See* Brader et al., *supra* note 68, at 967–69; Ramakrishnan & Gulasekaram, *supra* note 63, at 1471–79.

72. *See* Brader et al., *supra* note 68, at 972–75.

73. *See, e.g.*, *Hundreds Protest Immigration Law in Arizona*, CNN (Apr. 26, 2010, 11:50 AM), http://www.cnn.com/2010/POLITICS/04/25/arizona.immigration.protest/index.html [https://perma.cc/XQ56-V8B5] ("'What is "reasonable suspicion?"' protester Jose Acosta asked Sunday. 'Are we going to get pulled over just because of a broken taillight or because of the color of our skin?'"); Julia Preston, *Immigration Advocates Rally for Change*, N.Y. TIMES (May 1, 2010), https://www.nytimes.com/2010/05/02/us/02immig.html [https://perma.cc/DQL4-DULT] (reporting on advocacy connecting immigration enforcement, criminality, and race); Tom Dart, *Texas Set for Protests Over SB4 Law and Trump Threat to Dreamer Protection*, GUARDIAN (Aug. 27, 2017, 9:28 AM), https://www.theguardian.com/us-news/2017/aug/27/austin-immigration-protest-trump-daca-dreamers [https://perma.cc/5FDC-W76H] (reporting concerns that Texas law SB4 would turn routine traffic stops into "a gateway to racial profiling and increased deportations"); Jessica P. Ogilvie, *Proposition 187: Why a Ballot Initiative That Passed in 1994 (And Never Went into Law) Still Matters*, LAIST (Nov. 6, 2019, 10:45 AM), https://laist.com/news/proposition-187-what-you-need-to-know [https://perma.cc/Q32Q-RYLJ] (reporting that the Los Angeles protest against Proposition 187 drew 70,000 people).

and therefore more rare.[74] Congress curtailed the discretion of immigration judges and agency officials to grant relief from deportation.[75]

As for judicial development of immigration law through Article III courts, courts have taken an active role in interpreting immigration statutes, but that role is circumscribed.[76] Long-standing doctrines of deference to Congress's plenary power over immigration limit constitutional challenges.[77] Jurisdiction-stripping statutes unique to immigration law constrict the role of the federal judiciary in developing the law.[78] Congress placed statutory prohibitions on

74. *See* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 598 (2012) [hereinafter Family, *Administrative Law*] (observing that "[a] dearth of notice-and-comment rulemaking is an issue facing all of administrative law," particularly immigration law); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473 (2008) (reporting that in 2005 "the government publish[ed] [forty-eight percent] fewer final rules and [sixty-one percent] fewer proposed rules" than in 1979, "and . . . [thirty-four percent] fewer final rules and [forty-two percent] fewer proposed rules than . . . in 1983"); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 896 (2008) (explaining that agencies have increasingly "enact[ed] binding rules without going through notice-and-comment procedures"); Connor Raso, *Where and Why Has Agency Rulemaking Declined Under Trump?*, BROOKINGS INST. (June 29, 2018), https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump [https://perma.cc/4ETU-XW5S] (reporting rulemaking output by presidential administration).

75. *See* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 557–58 (2011) [hereinafter Family, *Beyond Decisional Independence*].

76. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–75 (1990) [hereinafter Motomura, *Phantom Constitutional Norms*]; Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1449–56 (2018) (discussing the potential for judicial review of removal decisions to introduce proportionality norms into immigration law).

77. *E.g.*, Kerry v. Din, 576 U.S. 86, 87 (2015) (relying on the plenary power doctrine in deferring to Congress's immigration policies); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (declaring that the judiciary must defer to the power of the legislature to exclude "foreigners of a different race . . . who will not assimilate with us").

78. *See* 8 U.S.C. § 1252(a)(2)(B)–(C); *see also* Family, *Beyond Decisional Independence*, *supra* note 75, at 582 (describing legislation that "carv[ed] out whole classes of decisions from judicial review" including discretionary decisions and crime-based removal orders); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 41 (2006) ("For the past ten years, Congress has tried to reduce the quantity and quality of judicial review of administrative removal orders."); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 162–63 (2006) (describing the "severe limitation" of judicial review in AEDPA and IIRIRA and "the[] preclusion of judicial review of . . . agency decision[-making]").

judicial review of agency discretion and removal outcomes[79] and restrictions on large-scale tools for judicial review such as class actions.[80] These constrictions on judicial review led courts to take less direct paths to review of immigration law. They have injected "phantom constitutional norms" into immigration law through statutory interpretation[81] and subjected agency action to scrutiny under administrative law or preemption doctrines.[82]

B. THE RISE OF LIMINAL IMMIGRATION LAW

The pressure for change in immigration law encountered the vacuum of traditional law reform, forming the crucible for liminal immigration law. Three case studies exemplify the liminal rules that were created in this crucible: DACA, the immigration detainer, and administrative closure in immigration court. We chose these examples for several reasons. Individually, each has had a major impact on immigration policy by revising immigration policy and practice on a national level. Together, they illustrate the diversity of liminal immigration rules, from bestowing protection from deportation to expanding deportation tools. Immigration detainers are enforcement-oriented and further crimmigration and deportation, whereas DACA and administrative closure protect individuals from deportation and resist the expansion of crimmigration. Finally, comparing them illustrates the very different contexts in which liminal rules arise, from the top of the executive branch in the case of DACA, to the accretion of enforcement practices in the case of the immigration detainer, to the judicial context in which administrative closure operates.

These examples demonstrate the power and durability of liminal law and its capacity to shape how immigration law functions on the ground. The three liminal rules have distinct origins and different effects, and they govern diverse actors and issues within immigration law and policy. However, they share the same three characteristics. They are robust, wielding the power of traditional law. Though appearing vulnerable to rescission, they are sticky in that they resist attempts to snuff them out. Finally, liminal rules operate in a state of transition, moving either toward formalization as traditional law, or toward extinction.[83]

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79. *See* Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 242, 66 Stat. 163, 208–12 (1952) (narrowing or eliminating judicial review of agency determinations including final and expedited removal orders); *see also* INS v. St. Cyr, 533 U.S. 289, 313–14 (2001) (interpreting the statute to require some habeas review of final orders of removal); DHS v. Thuraissigiam, 140 S. Ct. 1959, 1968–71 (2020) (upholding statutory limits on habeas review of expedited removal orders).

80. *See* Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71, 109–16 (2008) [hereinafter Family, *Threats to the Future of the Immigration Class Action*] (articulating threats to jurisdiction over immigration class actions).

81. *See* Motomura, *Phantom Constitutional Norms*, *supra* note 76, at 549–50.

82. Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 100–01 (2018).

83. *See infra* Part III.

1. The Origin of Deferred Action for Childhood Arrivals

The DACA program established both a liminal rule and a liminal immigration status. The crimmigration trends of the 1980s and 1990s, criminalizing noncitizens and ramping up southern border controls, [84] disrupted the historical patterns of circular migration across the U.S.-Mexico border.[85] Instead, workers came and stayed in the United States, and families followed.[86] By 2000, there were 8.6 million undocumented immigrants in the United States, of whom about 1.5 million were children.[87]

These families settled in the communities in which they worked. Undocumented children grew up in U.S. communities, but without access to registry or other formal inclusion through immigration status.[88] Coming of age as an undocumented youth meant learning that U.S. society and U.S. law categorized them as no different from other excluded groups: as criminalized, isolated, and invisible to all except enforcement authorities.[89] Their undocumented status foreclosed them from opportunities that their peers enjoyed, including attending college, working in a chosen field, and living without fear of expulsion from the country.[90]

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84. *See* Stumpf, *The Crimmigration Crisis*, *supra* note 58, at 382–84, 395, 406; GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW, *supra* note 51, at 222–23; César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1503–07 [hereinafter García Hernández, *Creating Crimmigration*]; Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–40 (2009) [hereinafter Chacón, *Managing Migration Through Crime*].

85. *See* DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 128–33 (2002) (observing that increased economic and human costs of border crossing, resulting from heightened border enforcement, increased lengths of stay in the United States and lowered return probabilities).

86. *See id.*; Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 103–06 (2006) [hereinafter Motomura, *We Asked for Workers, but Families Came*] (describing as "chronic failure" a one-dimensional perception of immigrants as workers unconnected with families and observing that family-based admissions constitute seventy-five to eighty percent of U.S. immigrant admissions).

87. Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade [https://perma.cc/75M3-ZLWA].

88. *See* NICHOLLS, *supra* note 60, at 2, 47–49; *see, e.g.*, Jose Antonio Vargas, *Not Legal Not Leaving*, TIME MAG. (June 25, 2012, 1:44 PM), https://time.com/2987974/jose-vargas-detained-time-cover-story [https://perma.cc/QM2U-YU8Y] (describing the discovery of his "precarious status" and its impacts).

89. *See* Vargas, *supra* note 88; *see also* Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 27–37 (2018) [hereinafter Chacón, *Citizenship Matters*] (observing that commonly recurring fears for undocumented residents include impediments to movement, limitations on work and educational opportunities, constant fear of deportation, and harm to overall social standing).

90. *See* Chacón, *Citizenship Matters*, *supra* note 89, at 27–37; NICHOLLS, *supra* note 60, at 2–4.

Deportations of these undocumented residents and their families drew public attention.[91] Their stories were in tension with narratives about crimmigration and security risks from unrestricted immigration.[92] Despite barriers to formal pathways to political and social change such as voting, undocumented youth built a movement that ultimately influenced the legal criteria for DACA: youth, formative time in the United States, and the potential for contributing to society.[93]

Hope lay initially in legislation. Immigrant youth, dubbed "Dreamers," pushed for passage of the DREAM Act, a bill that would create a legal status and a pathway to U.S. citizenship.[94] Introduced as a bipartisan bill in 2001, the DREAM Act carved out of the general population of undocumented residents a group defined both by youth and a dual conception of innocence: Those too young to bear responsibility for crossing the border or remaining beyond a visa deadline and with a clean criminal record other than non-drug-related misdemeanors.[95]

The narrow defeat of the DREAM Act in 2010 was a tremendous blow to the Dreamers. It opened a rift with established advocacy groups and

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91. *See, e.g.*, Maria Sacchetti, *US May Deport Harvard Student*, BOS. GLOBE (June 12, 2010), http://archive.boston.com/news/local/massachusetts/articles/2010/06/12/us_may_deport_harvard_student [https://perma.cc/73RJ-BX4H]; Jonathan Oosting, *Face of DREAM Act Facing Deportation? Metro Detroiter Who Immigrated at 11 Released from Jail*, MLIVE (Aug. 24, 2010, 12:30 PM), https://www.mlive.com/news/detroit/2010/08/face_of_dream_act_facing_depor.html [https://perma.cc/3HFF-2NBF]; Anne Saker, *At Portland's Airport, Young Man Reunites With Family After Odyssey of Deportation and Detention*, OREGONIAN (Dec. 24, 2010, 7:52 PM), https://www.oregonlive.com/pacific-northwest-news/2010/12/at_portlands_airport_young_man_reunites_with_family_after_odyssey_of_deportation_and_detention.html [https://perma.cc/R436-VREK].

92. *See* Stumpf, *The Crimmigration Crisis*, *supra* note 58, at 395; Julián Aguilar, *The New ICE Age*, TEX. TRIB. (June 16, 2010, 5:00 AM), https://www.texastribune.org/2010/06/16/ice-outlines-plan-to-increase-alien-deportation [https://perma.cc/M3DT-Z6SU]; Scott Horsley, *Under Obama, More Illegal Immigrants Sent Home*, NPR (July 28, 2010, 2:32 PM), https://www.npr.org/templates/story/story.php?storyId=128826285 [https://perma.cc/S96J-LAP7].

93. *See* NICHOLLS, *supra* note 60, at 11–12, 68–69; *see also* Julia Preston, *Illegal Immigrant Students Protest at McCain Office*, N.Y. TIMES (May 17, 2010), https://www.nytimes.com/2010/05/18/us/18dream.html [https://perma.cc/94ZW-3QCN] (describing undocumented noncitizen students' sit-in in congressional offices to advocate for legislative action on legal status).

94. *See generally* Development, Relief, and Education for Alien Minors ("DREAM") Act, S. 1291, 107th Cong. (2002) (as reported to Senate) (preventing removal of eligible youth who came to the United States as children).

95. *Id.* § 3(a)(1). Critiques of the DREAM Act included its limitations based on age and school enrollment, and broad exclusion of those unable to show "good moral character" under the immigration laws, among other things. *See* Dream Act of 2017, S. 1615, 115th Cong. § 3(b)(1)(B)–(C) (2017); Dream Act of 2017, H.R. 3440, 115th Cong. §§ 3(b)(1)(B)–3(b)(C) (2017); Cecelia M. Espenoza, *Relief for Undocumented Students: The Dream Act a Piece of the Puzzle in Overall Immigration Reform or a Puzzle With Missing Pieces?*, 56 FED. LAW. 44, 48 (2009); JEANNE BATALOVA & MICHAEL FIX, MIGRATION POL'Y INST., NEW ESTIMATES OF UNAUTHORIZED YOUTH ELIGIBLE FOR LEGAL STATUS UNDER THE DREAM ACT 4–5 (2006), https://www.migrationpolicy.org/sites/default/files/publications/Backgrounder1_Dream_Act.pdf [https://perma.cc/D9NE-3YXB] (observing that not all eligible beneficiaries of the DREAM Act would be able to join the military or go to college).

compelled the Dreamers to adopt more innovative forms of social and political activism.[96] They pushed the Obama Administration for a solution.[97]

The Administration's first attempt was largely a failure. In June 2011, the Director of Immigration and Customs Enforcement issued two memos instructing ICE agents and other enforcement personnel to exercise discretion negatively, refraining from arresting and pursuing deportation of those, like the Dreamers, at the bottom of the enforcement priority list.[98]

In 2012, the Administration unveiled DACA, providing a form of prosecutorial discretion called "deferred action" that bestowed temporary protection from deportation.[99] President Obama announced the initiative in a speech in the Rose Garden, and Janet Napolitano, Secretary of the Department of Homeland Security, issued a memo setting out its scope and coverage.[100] DACA largely mirrored the provisions of the DREAM Act in defining who was covered. Deferred action bestowed no legal status, but it offered a renewable two years of protection from removal and permitted temporary work authorization.[101] Two years later in 2014, the Obama Administration created the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") allowing undocumented parents of

96. Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIA. L. REV. 556, 570–71 (2016) (noting that DREAMers achieved legal outcomes and built power within their communities by "working cases," identifying sympathetic DREAMers facing deportation and advocating on their behalf, and pursuing more immediate goals than legislative reform); *see* NICHOLLS, *supra* note 60, at 68–69, 100–17; Chacón, *Producing Liminal Legality*, *supra* note 7, at 739.

97. McLeod, *supra* note 96, at 577–79.

98. *See generally* Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees 1 (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/TEN6-RE3M] (detailing "civil immigration and enforcement priorities"); Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Off. Dirs., All Special Agents in Charge, All Chief Couns. 1 (June 17, 2011) [hereinafter Morton Memo], https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf [https://perma.cc/T4SZ-L8VX] (building off "prior guidance on . . . the exercise of prosecutorial discretion").

99. *See* Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html [https://perma.cc/Y3GB-GGP2].

100. *See* Press Release, Barack Obama, President of the U.S., Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/E7YV-XZLQ]; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., John Morton, Dir., U.S. Immigr. & Customs Enf't 1 (June 15, 2012) [hereinafter DACA Memo], https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/Z94M-XJ7G]; *see also* Family, *The Executive Power*, *supra* note 54, at 68 (describing the "prosecutorial discretion efforts [as] . . . linked to the failure to achieve statutory reform of immigration law").

101. *See* DACA Memo, *supra* note 100, at 2–3.

U.S. citizens and lawful permanent residents to obtain deferred action and work authorization.[102]

The priority-setting memo, DACA, and DAPA were unpopular with enforcement personnel, and in 2012, the union of ICE agents brought suit seeking their retraction.[103] Several states banded together to challenge DACA as beyond the authority of the agency.[104] The district court struck down DAPA along with an extension of the DACA program; however, it allowed incumbent DACA recipients to retain their deferred action protection. [105] A divided Supreme Court upheld the ruling.[106]

In September 2017, responding to heavy pressure from his base, President Donald Trump attempted to retract DACA and end the protections that thousands had obtained since 2012.[107] His administration issued a memo declaring that DACA was unconstitutional, lacked a statutory foundation, and presented a litigation risk.[108]

The 2017 memo retracting DACA was immediately challenged as contrary to the Administrative Procedure Act ("APA") and unconstitutionally racially motivated.[109] In 2020, the Supreme Court rejected the Trump

102. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. 3–5 (Nov. 20, 2014) [hereinafter DAPA Memo], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_0.pdf [https://perma.cc/5MHR-GR23].

103. Crane v. Napolitano, 920 F. Supp. 2d 724, 729–31 (N.D. Tex. 2013) (challenging both the Morton memo and the DACA memo), *aff'd sub nom.* Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015); *see* Corey Dade, *Immigration Employees File Suit Against Obama's New Immigration Policy*, NPR (Aug. 23, 2012, 6:33 PM), https://www.npr.org/sections/thetwo-way/2012/08/23/159926481/immigration-employees-file-suit-against-obamas-new-immigration-policy [https://perma.cc/BW9E-RYND].

104. *See* Texas v. United States, 328 F. Supp. 3d 662, 742 (S.D. Tex. 2018).

105. Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd*, Texas v. United States (*Texas II*), 809 F.3d 134 (5th Cir. 2015).

106. United States v. Texas, 579 U.S. 547, 548 (2016).

107. *See* Sara Wise, *Trump's DACA Flip-Flops: A Timeline*, ROLL CALL (Jan. 30, 2018, 5:29 PM), https://www.rollcall.com/2018/01/30/trumps-daca-flip-flops-a-timeline [https://perma.cc/3DCP-MNKK]; John Cassidy, *How Many Supporters Do Trump's Conservative Critics on DACA Have?*, NEW YORKER (Sept. 14, 2017), https://www.newyorker.com/news/john-cassidy/how-many-supporters-do-trumps-conservative-critics-on-daca-have [https://perma.cc/J2CL-8PK6]; *infra* Section II.B.1.

108. Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Joseph B. Maher, Acting Gen. Couns., Amb. James D. Nealon, Assistant Sec'y, Int'l Engagement, Julie M. Kirchner, Ombudsman, Citizenship & Immigr. Servs. (Sept. 5, 2017) [hereinafter Duke Memo], https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/H8ZQ-PMTA].

109. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 223 (D.D.C. 2018), *aff'd sub nom.* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 269 (S.D.N.Y. 2018), *rev'd in part by* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); Regents of the Univ. of Cal. v. DHS, 908 F.3d 476, 518–19 (9th Cir. 2018), *rev'd in part by* 140 S. Ct. 1891 (2020). Together, these lawsuits resulted in nationwide injunctions against

Administration's withdrawal of DACA on narrow grounds but laid out a pathway by which the Administration might lawfully dismantle the program.[110] Before the Administration could regroup, Trump lost the 2020 election.[111] In January 2021, President Joseph Biden resurrected the DACA memo in one of his first acts as President.[112] Seven months later, the Biden Administration promulgated a regulation to implement DACA's provisions.[113]

2. The Roots of the Mandatory Immigration Detainer

Concurrently with the events that gave rise to DACA, another liminal rule arose requiring police to hold noncitizens in custody when ICE officials provided notice that the noncitizen was of interest to the agency.[114] Called a "detainer," this do-not-release rule contributed to the Obama Administration earning the distinction of deporting over five million people, more than any previous administration.[115]

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rescission, with the effect that DACA recipients could renew their DACA grants but USCIS could not approve new DACA applications. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, https://www.uscis.gov/i-821d [https://perma.cc/7NSF-5BL3]. Two courts allowed the racial discrimination claims to proceed based on President Trump's characterization of Latinx and Mexican people as "animals," "bad hombres," "criminals, drug dealers, [and] rapists." *Batalla Vidal*, 291 F. Supp. 3d at 274, 276–77; *accord Regents of the Univ. of California*, 908 F.3d at 518–19. A subsequent DHS memo sought to bolster the rationale for retraction. *See* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [https://perma.cc/5T29-SMVY] (drawing parallels between DACA and the enjoined DAPA program and advocating legislative reform and case-by-case agency decision-making over high-level policymaking).

110. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1912–14.

111. Hope Yen, *AP FACT CHECK: Yes, Trump Lost Election Despite What He Says*, ASSOCIATED PRESS (May 6, 2021), https://apnews.com/article/donald-trump-michael-pence-electoral-college-elections-health-2d9bd47a8bd3561682ac46c6b3873a10 [https://perma.cc/ZJH2-G6L8].

112. Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7,053, 7,053 (Jan. 20, 2021). *See generally* Texas v. United States, 50 F.4th 498 (5th Cir. 2022) (holding that DACA violated the APA's procedural and substantive provisions).

113. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152, 53,152 (Aug. 30, 2022).

114. Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 633–34 (2013) [hereinafter Lasch, *Federal Immigration Detainers*]; Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165 (2008) [hereinafter Lasch, *Enforcing the Limits*]; Stumpf, *D(e)volving Discretion*, *supra* note 10, at 1260–61, 1270, 1275; *see* Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1106 (2013).

115. Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not [https://perma.cc/TE37-SMJP]. There were fewer apprehensions and returns under the Obama Administration than each of the two prior administrations, but the number of formal removals under the Obama Administration far surpassed those of the Bush and Clinton Administrations. *Id.*; Caitlin Dickson, *Is Obama Really the Deporter-in-Chief? Yes and No.*, DAILY BEAST (July 12, 2017, 2:45 PM), https://www.thedailybeast.com/is-obama-really-the-deporter-in-chief-yes-and-no [https://perma.cc/D48D-JVD9].

The do-not-release rule was an element of a larger program called Secure Communities, connecting federal immigration enforcement functions with state and local police and sheriffs nationwide.[116] Secure Communities sought to leverage for immigration purposes the regular contact that state and local law-enforcement officials had with noncitizens stopped for or convicted of crimes.[117] The program identified suspected immigration violators by giving immigration enforcement officials access to a national database of state and federal criminal arrestees.[118] Once immigration officials identified an individual for investigation, however, they were faced with the problem of assuming custody of the person before state or local officials released the individual.[119]

The mandatory immigration detainer was their solution. An understanding grew up around the Secure Communities program that a federal immigration detainer obligated the arresting sheriff or police department to keep the noncitizen in custody until federal officials arrived.[120] Issuance of detainers, which had hovered at just over 5,000 annually in 2003 and 2004 and rocketed to nearly 310,000 by 2011.[121]

The practice of complying with the detainer continued until 2014, when a series of court decisions declared the practice unconstitutional.[122] Facing the prospect of considerable damage awards, states and localities across the nation adopted policies declining to comply with the detainers.[123] In November 2014, the Department of Homeland Security terminated Secure Communities, citing its constitutionally questionable nature and substantial

116. Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1089, 1104 (2019).

117. Cimini & Smith, *supra* note 11, 461–62.

118. Stumpf, *D(e)volving Discretion*, *supra* note 10, at 1268–69.

119. *Id.* at 1269–70.

120. *Id.* (describing the function of the immigration detainer).

121. *See Latest Data: Immigration and Customs Enforcement Detainers*, TRAC IMMIGR. (June 2020), http://trac.syr.edu/phptools/immigration/detain [https://perma.cc/379P-NWRC]; *cf.* U.S. IMMIGR. & CUSTOMS ENF'T, DHS RELEASES END OF YEAR STATISTICS (2014), https://www.ice.gov/news/releases/dhs-releases-end-year-statistics [https://perma.cc/W9NL-A3Y6] (providing high numbers for detainers after 2011).

122. Galarza v. Szalczyk, 745 F.3d 634, 640–42, 645 (3d Cir. 2014) (construing the immigration detainer as a request rather than an obligation); Miranda-Olivares v. Clackamas Cnty., No. 12-cv-02317, 2014 WL 1414305, at *10–11 (D. Or. Apr. 11, 2014) (holding that the plaintiff was deprived of her Fourth Amendment rights when she was detained without probable cause pursuant to an immigration detainer); *see also* Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. Feb. 12, 2014), *aff'd in part, dismissed in part*, 793 F.3d 208 (1st Cir. 2015) (invalidating an immigration detainer issued "for purposes of mere investigation").

123. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, Megan Mack, Officer, Off. of C.R. & C.L., Philip A. McNamara, Assistant Sec'y for Intergovernmental Affs. 1–2 (Nov. 20, 2014) [hereinafter November 2014 Secure Communities Memo], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/4853-KM4N].

opposition to its operation.[124] The detainer became a request, rather than a mandate.[125]

This shift in the nature of the ICE detainer from mandate to request became a stumbling block for the Trump Administration's attempt to revive Secure Communities.[126] As the country polarized around the election results, scores of local jurisdictions either declared themselves to be "sanctuary" jurisdictions that declined detainer requests or publicly embraced the Secure Communities program and the detainer.[127] The constitutionally suspect nature of the detainer and the deportation orientation of the Trump Administration had compelled localities to affirmatively choose whether to reconstruct the do-not-release rule on a local level.

In September 2021, President Biden's administration issued new immigration enforcement priorities, putting terrorist threats, current threats to public safety, and recent border crossers at the top of the enforcement priority list.[128] It de-emphasized individuals suspected only of lacking immigration status.[129] The memo directed officials to carry out the Administration's priorities using discretion in determining whether to pursue arrest, issue detainers, and seek removal.[130] The Supreme Court granted certiorari after lower courts split over whether the priorities likely violated the

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124. *See id.* (declaring that Secure Communities "has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws").

125. *See, e.g.*, *Galarza*, 745 F.3d at 640–42, 645 (construing the immigration detainer as a request to states and localities rather than as a requirement, thereby clearing the path to finding a municipality liable when it relied on an immigration detainer to hold a U.S. citizen); *see also* Stumpf, *D(e)volving Discretion*, *supra* note 10, at 1283 (discussing DHS Secretary Johnson's demotion of the detainer from a federal mandate to a request).

126. Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017) [hereinafter Interior Enforcement Order].

127. Christopher N. Lasch et. al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1722 (2018) [hereinafter Lasch et. al., *Understanding "Sanctuary Cities"*] (collecting, categorizing, and analyzing sanctuary policies); Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 546–48 (2017) [hereinafter Lai & Lasch, *Crimmigration Resistance*] (identifying "four successive waves" of "sanctuary policies"); *see also* Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 233–35 (2016) (relating the rise of "sanctuary" cities to California's "Kate's Law"); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 14 (2016) [hereinafter Chen, *Trust in Immigration Enforcement*] (examining state noncooperation with detainers).

128. *See* Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't 2–4 (Sept. 30, 2021) [hereinafter Mayorkas Prosecutorial Discretion Memo], https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/BZE2-FSH4].

129. *Id.* at 2.

130. *Id.*

APA, leaving in place a district court injunction that had maintained the Trump Administration's enforcement priorities.[131]

3. The Rise of Administrative Closure as Relief from Removal

The third case study is the use of administrative closure of immigration court cases as a functional substitute for relief from removal. An immigration judge's administrative closure of a removal case retracts it from the docket temporarily but without rescheduling, making the case closure indefinite.[132] Immigration judges use administrative closure when noncitizens have a pathway to immigration status that a removal order would foreclose.[133] A judge may also use it when a noncitizen has no current avenue for lawful status but removal would interfere with significant ties the noncitizen has to the United States such as marriage to a U.S. citizen.[134] Typical situations in which administrative closure can prevent or delay removal are cases in which a visa petition is pending with the United States Citizenship and Immigration Services ("USCIS") or when a noncitizen is pursuing a direct appeal or post-conviction relief in a criminal case.[135]

To initiate administrative closure, either the noncitizen or the government files a motion to administratively close the case, or the judge may *sua sponte* inquire about closure in low-priority cases.[136] If one party opposes, the

131. United States v. Texas, No. 22A17 (22-58), 2022 WL 2841804, at *1 (July 21, 2022) (mem.) (granting certiorari before judgment to review a Texas district court's preliminary injunction of the priorities memo); *see* Arizona v. Biden, 40 F.4th 375, 387, 390 (6th Cir. 2022) (upholding the priorities memo against an APA challenge); Texas v. United States, No. 21-cv-00016, 2022 WL 2109204, at *1–2, *25–34 (S.D. Tex. June 10, 2022) (holding that the priorities memo violated the APA); Texas v. United States, 40 F.4th 205, 228–30 (5th Cir. 2022) (declining to stay the district court's vacatur of the priorities memo, reasoning that the memo likely violated the APA).

132. *The Life and Death of Administrative Closure*, TRAC IMMIGR. (Sept. 10, 2020), https://trac.syr.edu/immigration/reports/623 [https://perma.cc/47RL-LT68].

133. *See id.*

134. Matter of Avetisyan, 25 I. & N. Dec. 688, 696 (B.I.A. 2012) (confirming that administrative closure may be appropriate when a marriage-based application for adjustment of status to lawful permanent residence is pending). *Matter of Avetisyan* was overruled by Attorney General Sessions in *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (U.S. Att'y Gen. 2018), which was in turn overruled by Attorney General Garland in *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (U.S. Att'y Gen. 2021). *Cruz-Valdez* restored *Avetisyan* as the governing precedent. *Cruz-Valdez*, 28 I. & N. Dec. at 329.

135. *See* NAT'L IMMIGRANT JUST. CTR., PRACTICE ADVISORY: THE RETURN OF ADMINISTRATIVE CLOSURE 1 (2020), https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-return-administrative-closure [https://perma.cc/PQ2H-FXU5]; *see also* Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 U. PA. J. CONST. L. 1025, 1042 (2019) [hereinafter Family, *Immigration Adjudication Bankruptcy*] ("A common use of administrative closure was to pause a removal case where the respondent noncitizen had a collateral action pending (such as an application for a green card) that might have affected the outcome of the removal proceeding." (citing AM. IMMIGR. COUNCIL & ACLU, ADMINISTRATIVE CLOSURE POST-CASTRO-TUM PRACTICE ADVISORY (2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post_castro_tum_0.pdf [https://perma.cc/24HH-8BNP])).

136. *See* NAT'L IMMIGRANT JUST. CTR., *supra* note 135, at 3.

immigration court determines whether to grant the request for administrative closure using criteria gleaned from precedent.[137] Once administratively closed, the case remains off the court's docket unless a party successfully moves to reinstate the case on the docket.[138] Most cases are decided quickly after such re-calendaring.[139]

Administrative closure took form as a liminal rule beginning in 2011, when the Obama Administration set specific criteria for the exercise of prosecutorial discretion in pursuing removal.[140] The criteria allowed for prosecutorial dismissal of proceedings or agreement to close cases.[141] This approach aimed to preserve resources for pursuing crime-based or national security-related removals by removing from the docket lower priority cases involving noncitizens with family ties, community contributions, or military service.[142]

Like DACA, the use of administrative closure as a form of relief from removal arose not through legislation or a regulation, but through a White House announcement and an agency memo confirming the immigration courts' authority to close cases and the use of closure to pursue the enforcement priorities.[143] This memo, together with a 2012 Board of Immigration Appeals ("BIA") decision legitimizing administrative closure, established the contours of the rule and the authority of immigration judges to implement it.[144]

The history of administrative closure is a roller coaster. Immigration judges began the practice of closing cases on their dockets soon after the

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137. *See Avetisyan*, 25 I. & N. Dec. at 694 ("[W]e hold that the Immigration Judges and the Board [of Immigration Appeals] have the authority . . . to administratively close proceedings . . . even if a party opposes.").

138. *See* U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 5.10(t) (2020), https://www.justice.gov/eoir/page/file/1258536/download [https://perma.cc/KU3C-54EC]. *See generally* Matter of W-Y-U-, 27 I. & N. Dec. 17 (B.I.A. 2017) (describing the effect of administrative closure and its criteria), *reaffirmed by* Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (U.S. Att'y Gen. 2021). *See also Avetisyan*, 25 I. & N. Dec. at 692 (providing comparable factors).

139. *The Life and Death of Administrative Closure*, *supra* note 132 (reporting that most re-calendared cases are decided within an average of four months).

140. *See supra* note 98 and accompanying text.

141. Cecilia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), https://obamawhitehouse.archives.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources [https://perma.cc/FL23-2BWG] (citing Morton Memo, *supra* note 98).

142. *See The Life and Death of Administrative Closure*, *supra* note 132.

143. *See* Morton Memo, *supra* note 98, at 3, 5–6. This DHS memo also set the enforcement criteria meant to protect undocumented resident youth prior to the DACA program. *See supra* notes 92–98 and accompanying text.

144. *See* Matter of Avetisyan, 25 I. & N. Dec. 688, 694 (B.I.A. 2012) ("[W]e hold that the Immigration Judges and the Board [of Immigration Appeals] have the authority . . . to administratively close proceedings . . . even if a party opposes."), *reaffirmed by* Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (U.S. Att'y Gen. 2021).

establishment of the immigration court system in 1983.[145] In 1984, a memo from a government official condoned using administrative closure in cases when an individual failed to appear.[146] After the IRCA provided for legalization of many noncitizen residents without stable immigration status,[147] immigration judges used administrative closure extensively between 1986 and 1990, staving off deportation for those applying for lawful permanent residence under the new law.[148] Administrative closures constituted almost a quarter of all case closures between 1986 and 1990, removing close to 80,800 cases from the docket.[149]

At that point, the BIA limited this power, first by restricting its use when another avenue was available such as issuing an *in absentia* order.[150] In 1990 and 1996, BIA decisions established that any party could veto a case closure, effectively delegating to government attorneys the power to determine whether an immigration judge would close a case.[151] Administrative closure rates nosedived, dropping to less than four percent of all case completions and remaining there until its 2012 reawakening.[152]

In 2017, the Trump Administration began a sustained campaign to eliminate administrative closure. First, the Department of Homeland Security ("DHS") revoked the memo that had set prosecutorial discretion priorities.[153]

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145. *The Life and Death of Administrative Closure*, *supra* note 132 (documenting 376,439 cases in which administrative closure was used to temporarily or permanently remove a proceeding from the court's active calendar).

146. Memorandum from William R. Robie, Chief Immigr. J., U.S. Dep't of Just., Exec. Off. for Immigr. Rev., to All Immigr. Js. 1 (Mar. 7, 1984), https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/84-2.pdf [https://perma.cc/6UB8-9J99]; *see also* Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J.F. 567, 570 (2020) (tracing the rise of administrative closure).

147. *See* Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–72 (codified at 8 U.S.C. § 1324(a)).

148. *See The Life and Death of Administrative Closure*, *supra* note 132.

149. *Id.*

150. *See* Matter of Amico, 19 I. & N. Dec. 652, 654 & n.1 (B.I.A. 1988).

151. *See id.*; Matter of Lopez-Barrios, 20 I. & N. Dec. 203, 204 (B.I.A. 1990), *overruled by* Matter of Avetisyan, 25 I. & N. Dec. 688 (B.I.A. 2012); Matter of Muñoz-Santos, 20 I. & N. Dec. 205, 206–08 (B.I.A. 1990); Matter of Gutierrez-Lopez, 21 I. & N. Dec. 479, 480–81 (B.I.A. 1996), *overruled by Avetisyan*, 25 I. & N. at 692–93. Together, these cases created an "absolute veto power over administrative closure." *See Avetisyan*, 25 I. & N. at 692–93; *see also* Kristin Bohman, Note, Avetisyan's *Limited Improvements Within the Overburdened Immigration Court System*, 85 U. COLO. L. REV. 189, 198 (2014) (describing the government's veto power); Montano, *supra* note 146, at 570–72 (describing early limitations on administrative closure); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 60 (2013) [hereinafter Wadhia, *The Immigration Prosecutor and the Judge*] ("*Matter of Gutierrez* confused the prosecutorial role of the DHS attorney and the independent discretion of the immigration judge by giving DHS unilateral power over the administrative closure decisions.").

152. *See The Life and Death of Administrative Closure*, *supra* note 132.

153. *See* Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S.

Second, Attorney General Jeff Sessions declared in *Matter of Castro-Tum* that immigration judges "lack a general authority to grant administrative closure."[154] The administration then proposed a regulation that would have eliminated administrative closure by "mak[ing] clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases."[155]

These changes had a tremendous impact. Case closures based on prosecutorial consent plummeted, from nearly 25,000 in 2016 to about 8,500 in 2017.[156] In 2019, there were a bare seven instances of administrative closure involving prosecutorial discretion.[157] *Castro-Tum* nearly halted grants by immigration courts, which dropped from over 27,000 grants in 2016 to 503 by 2019.[158] By the end of 2019, administrative closure was moribund, constituting less than one percent of all case completions.[159]

Yet, administrative closure persisted. With the departure of the Trump Administration, administrative closure revived. In March 2021, a nationwide injunction halted the regulation that would have essentially codified *Castro-Tum*'s stripping of administrative closure authority.[160] In July 2021, Attorney General Merrick Garland reversed *Castro-Tum*, restoring closure authority to immigration judges.[161] And in September 2021, DHS Secretary Alejandro Mayorkas issued a memo reinstating prosecutorial discretion and setting broad enforcement priorities to be implemented across the agency.[162]

In alignment with the DHS memo, the Executive Office for Immigration Review ("EOIR"), which oversees the immigration courts, directed immigration judges to actively employ administrative closure consistently with the DHS

Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., U.S. Dep't of Homeland Sec., Dimple Shah, Acting Assistant Sec'y for Int'l Affs., U.S. Dep't of Homeland Sec., Chip Fulghum, Acting Undersecretary for Mgmt., U.S. Dep't of Homeland Sec. 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/QUF8-JRHZ] [hereinafter Kelly Enforcement Memo].

154. Matter of Castro-Tum, 27 I. & N. Dec. 271, 282 (U.S. Att'y Gen. 2018), *overruled by* Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (U.S. Att'y Gen. 2021). Some appellate courts disagreed with the holding of the case. *See* Arcos Sanchez v. Att'y Gen., 997 F.3d 113, 121–22 (3d Cir. 2021); Romero v. Barr, 937 F.3d 282, 292 (4th Cir. 2019). One appellate court agreed generally with *Castro-Tum*, see *Hernandez-Serrano*, 981 F.3d at 466, but later held that administrative closure was proper to permit a noncitizen to apply for a provisional unlawful presence waiver. *See* Garcia-DeLeon v. Garland, 999 F.3d 986, 991–93 (6th Cir. 2021).

155. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, 52,491 (Aug. 26, 2020) (to be codified at 8 C.F.R. §§ 1003, 1240).

156. *See The Life and Death of Administrative Closure*, *supra* note 132.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See* Centro Legal de la Raza v. Exec. Off. for Immigr. Rev., 524 F. Supp. 3d 919, 980 (N.D. Cal. 2021).

161. *See* Matter of Cruz-Valdez, 28 I. & N. Dec. 326, 326 (U.S. Att'y Gen. 2021).

162. *See* Mayorkas Prosecutorial Discretion Memo, *supra* note 128, at 2–4.

enforcement priorities.[163] It instructed judges to encourage pre-hearing resolution of administrative closure issues, offering it as a tool to clear low-priority cases to make room for cases fitting the DHS enforcement priorities and those in which the noncitizen sought adjudication of the case.[164]

The effect of these changes and reversals was to re-establish administrative closure as a form of relief from removal. Administrative closure narrowed formal removal orders to a prioritized set of cases and criteria and imposed a "do-not-remove" rule for the remainder.

II. RECOGNIZING LIMINAL IMMIGRATION LAW

Liminal law results from the clash between ossified immigration law and the pressure for social change.[165] The creation and persistence of DACA, the rise and fall and rise again of the immigration detainer, and administrative closure are three examples of liminal rules that are as potent as traditional legal rules. In spite of their ephemeral appearance, liminal rules are surprisingly resistant to change. We call these rules "liminal," because they hover between a traditional legal rule and an informal norm.[166]

Other scholars have offered glimpses of liminal law. The concept of liminal rules owes much to Hiroshi Motomura's seminal work on immigration outside of the law, phantom norms, and the role of discretion in immigration enforcement.[167] Jill Family has written about the law-like stature that immigration policy manuals and other government documents can acquire, rising from the body of administrative "soft" law.[168] Scholarship on the

163. DAVID L. NEAL, EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUST., DM 22–03: ADMINISTRATIVE CLOSURE 2–3 (2021) (citing Matter of Avetisyan, 25 I. & N. Dec. 688, 696 (B.I.A. 2012) (sanctioning the use of administrative closure to allow individuals to file for immigration benefits or for other appropriate purposes)). The Executive Office for Immigration Review ("EOIR") instructed judges to inquire whether the individual respondent is an "enforcement priority" and, if not, to explore discretionary alternatives including administrative closure. *Id.* at 1–3.

164. *Id.*

165. *See* Chacón, *Producing Liminal Legality*, *supra* note 7, at 764–65 ("[R]ights protection has required . . . engagement in political acts that assert previously unacknowledged rights into existence.").

166. *See id.* at 710, 719; Heeren, *supra* note 7, at 1129–33 (describing a related concept of liminal status). *See generally* Menjívar, *supra* note 15 (explicating liminality as applied to immigration status).

167. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 57, at 146–50; Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011), *reprinted in* 32 IMMIGR. & NAT'Y L. REV. 167, 174–90 (2013) [hereinafter Motomura, *The Discretion That Matters*].

168. *See* Family, *Administrative Law*, *supra* note 74, at 586, 592 (discussing how USCIS's non-legislative materials function essentially as administrative law). Soft law has its critics. *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 662 (2017) ("Critics of agency guidance have colorfully labeled it 'regulatory dark matter.'"); *see, e.g.*, CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., MAPPING WASHINGTON'S LAWLESSNESS: AN INVENTORY OF "REGULATORY DARK MATTER" 27 (2017), https://cei.org/wp-content/uploads

oversized role of discretion,[169] the ad hoc instrumentalism of immigration enforcement,[170] a "shadow sanction" system of enforcement,[171] and the bottom-up nature of immigration law rules[172] throws into relief the shadowy substance of liminal immigration law.

This Part builds on these scholars' work by defining liminal immigration law through its three hallmarks. First, liminal legal rules are robust. They wield outsized power in relation to their ephemeral status when compared with traditional legal forms such as statutes, regulations, and case law. Liminal rules act like formal legal rules, with the strength and vitality to have a substantial effect in the real world such as authorizing physical custody or providing protection from deportation.

Second, liminal legal rules are sticky—they are hard to dislodge. They appear fragile, vulnerable to an unraveling of their informal genesis or to reversal through changes in formal legal rules. And yet, they resist elimination. The activism or innovation that brought them into being sustains them; the pathways they create through practice and the passage of time roots them, rendering them resistant to change.

Third, liminal legal rules are in perpetual transition. Because they sit at the threshold of formal law, and are often buffeted by controversy, liminal law tends to move toward either formal recognition or toward extinction.

The three case studies—DACA, the mandatory ICE detainer, and the administrative closure of immigration litigation—illustrate these characteristics.

/2017/03/Wayne-Crews-Mapping-Washingtons-Lawlessness-2017.pdf [https://perma.cc/L2ZV-GXYV].

169. Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 68 (2015) ("[T]he quasi-legal recognition that subsequently may arise from deferred action is inherently tenuous . . . ."); *see* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 23, at 244; Kanstroom, *supra* note 78, 162–63; Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 767–74 (1997) (setting out critiques of discretion in immigration law); Motomura, *The Discretion That Matters*, *supra* note 167, at 174–90; García Hernández, *Creating Crimmigration*, *supra* note 84, at 1468–71; Susan Bibler Coutin, Sameer M. Ashar, Jennifer M. Chacón & Stephen Lee, *Deferred Action and the Discretionary State: Migration, Precarity and Resistance*, 21 CITIZENSHIP STUD. 951, 953–55 (2017).

170. *See* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 166 (2012).

171. *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2053 (2021) (describing the collection of informal, discretionary agency tools of forbearance from deportation, including deferred action, administrative closure, and orders of supervision as a system of unregulated "shadow sanctions").

172. *See* Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1188–89, 1198 (2016) (defining "bottom-up" immigration law as the ability of frontline officers, such as field agents and adjudicating officers, to implement immigration law on a day-to-day basis, exercising discretion based on guidance in policy memoranda).

A. *LIMINAL LAW IS ROBUST*

Liminal law is not traditional "hard" law, but it can be just as potent. Liminal law is difficult to recognize as "law" because, while it may use traditional law as a touchstone, it does not take the form of a statute, regulation, precedent, or executive order. Yet liminal law is robust: It has the same effect as traditional law in that it is cloaked with authority to compel compliance, change behavior, and establish norms.

Robustness refers to the degree to which non-traditionally created rules carry the same sort of power and breadth that traditionally created legal rules do. Like traditional legal rules, liminal rules set norms that agencies, individuals, and entities widely follow. In fact, liminal law can create the illusion that it is a form of traditional law, even when it is not.

1. DACA and the Do-Not-Deport Rule

DACA is a prime example of a robust nontraditional legal rule. The DACA program temporarily immunized thousands of noncitizens from immigration enforcement.[173] It acts as a talisman against deportation, prohibiting immigration agents from removing the DACA recipient.[174] That power to grant a temporary reprieve from removal resides in a regulation governing deferred action, a form of relief from removal that has been part of the immigration agency's toolbox for decades.[175] However, DACA's specific criteria combined with its effect—its power to protect a population of resident youth—set it apart from the everyday operation of discretion at the rank-and-file level.[176] The rule that DACA created—that a specific group of unlawfully present individuals could obtain at least temporary immunity from deportation—is a liminal legal rule.

DACA fits the first characteristic of a liminal legal rule. It is not the result of a statute or formal regulation, nor is it a judicial pronouncement. Its origin is distinct from and more casual than the processes that create statutes,

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173. *See generally* DACA Memo, *supra* note 100 (protecting applicable individuals from deportation). *See also* Chacón, *Producing Liminal Legality*, *supra* note 7, at 718–19 (explaining how "[s]everal recent executive actions offer certain noncitizens temporary deportation relief without legal status," including DACA); NICHOLLS, *supra* note 60, at 153–54 (providing that DACA granted some temporary relief while simultaneously denying access to certain privileges of citizenship); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 3 (2015) [hereinafter Motomura, *The President's Dilemma*] ("Approval of a DACA application provides certain noncitizens with a temporary two-year reprieve from deportation in the form of 'deferred action.'").

174. *See supra* notes 99–102 and accompanying text.

175. *See* 8 C.F.R. § 274a.12(c)(14); Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 23, at 264–65 (parsing the definitions and distinctions between Deferred Enforced Departure, Extended Voluntary Departure, and Temporary Protected Status).

176. *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 105, 179 (2020) (arguing that DACA should be understood as not "having eliminated discretion but as promoting the centralization of discretion within the bureaucracy").

regulations, and judicial precedent. DACA is widely—and erroneously—believed to have originated via a 2012 executive order of President Obama.[177] In fact, no such executive order exists. Instead, the President's announcement of the program in a 2012 speech in the Rose Garden together with a DHS memo established the parameters of the program.[178] This memo paved the way for another document that would serve as the heart of the program: Form I-821D, to be completed and submitted to the USCIS.[179] Those documents act as the medium through which individuals and agencies actuate the "do-not-deport" rule of DACA.[180]

At the same time, DACA has the power of traditional law. Like statutes, regulations, and precedent, DACA articulates a legal rule and defines its scope. It regulates authority within the government, transferring governance of the covered population of undocumented resident youth from enforcement officials to USCIS.[181] Most importantly, the rule that DACA establishes is robust, because it renders unlawful the expulsion of DACA holders. In defining DACA's core, the Supreme Court pointed to this impact of DACA, distinguishing it from the collateral conferral of benefits that ordinarily result from a grant of deferred action.[182] A final measure of DACA's potency is its impact, extending protection from deportation to more than 600,000 recipients as of June 2022.[183]

The Supreme Court recognized DACA's robustness in rebuffing the Trump Administration's attempt to rescind the program.[184] In determining that the rescission decision was reviewable, the Court relied on DACA's conferral

177. *E.g.*, Beth Fouhy, *'Fragile Change': Biden Signs Executive Orders but Many Lack Force*, NBC NEWS (Jan. 29, 2021, 11:09 AM), https://www.nbcnews.com/politics/white-house/fragile-change-biden-inks-executive-orders-many-lack-force-n1256165 [https://perma.cc/GN2B-KU3Y] (asserting that DACA was President Obama's "most contested executive order"); Caitlin Dickerson, *What Is DACA – and How Did It End Up in the Supreme Court?*, BALT. SUN (June 18, 2020, 2:42 PM), https://www.baltimoresun.com/news/nation-world/ct-nw-nyt-cb-what-is-daca-20200618-75eyblygfzaopklj3ua7h4ohba-story.html [https://perma.cc/M5PG-NMYU] (reporting that President Obama established DACA "through an executive order in 2012").

178. *See supra* notes 99–102 and accompanying text.

179. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 109 (providing the option to download the form).

180. *See* Alyse Bertenthal, *Speaking of Justice: Encounters in a Legal Self-Help Clinic*, 39 POL. & LEGAL ANTHROPOLOGY REV. 261, 266 (2016) (offering a vision of "justice" as the familiar, mundane tasks of legal practice, including filling out forms).

181. DACA Memo, *supra* note 100, at 2–3; COX & RODRÍGUEZ, *supra* note 176, at 179–80 (describing the shift of implementation of DACA from ICE to USCIS).

182. DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1911 (2020) (declaring that "[t]he defining feature of deferred action is the decision to defer removal"); *see also* Texas v. United States, 50 F.4th 498, 522–23 (5th Cir. 2022) (noting that more than "800,000 individuals have obtained forbearance under" the DACA memo).

183. *See Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POL'Y INST. (June 30, 2022), https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles [perma.cc/HH2Z-HX9W].

184. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1906–07.

of "affirmative immigration relief."[185] For the Court, DACA's grant of forbearance from removal and its accompanying benefits gave the program sufficient heft to make it reviewable under the APA.[186]

Controversy over a failed do-not-deport rule similar to DACA highlights DACA's robustness. DAPA would have allowed certain undocumented parents of U.S. citizens and lawful permanent residents to apply for deferred action.[187] Like DACA, DAPA was not named in a specific statute, regulation, or executive order. It originated from a presidential announcement and an agency memo and was to be implemented similarly by way of a government form and a DHS process.[188]

DAPA was not long for this world. It was almost immediately enjoined in a lawsuit that twenty-six states brought against both DAPA and a planned expansion of the DACA program.[189] The challenge to DAPA split the Fifth Circuit panels in two related appeals.[190] The disagreement between the majority opinions and the dissents centered on the robustness of the rule DAPA (and DACA) embodied and how closely it resembled the way a traditional legal rule operates. In considering whether the notice and comment requirements of the APA applied,[191] the controversy centered on whether DAPA "modifie[d] substantive rights and interests" in the way a legislative rule would (therefore constituting invalid agency overreaching) or was instead within the agency's legislatively delegated discretion.[192] In the majority's view, the power that the agency memo claimed, to confer lawful presence on 500,000 people who would receive work authorization and eligibility for driver's licenses, was sufficiently similar to legislation to render it invalid under the APA.[193] The dissents made two arguments: that DAPA was

185. *Id.*

186. *Id.* (explaining that "[b]ecause the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA").

187. DAPA Memo, *supra* note 102, at 3–5.

188. *Id.*; U.S. CITIZENSHIP & IMMIGR. SERVS., 2014 EXECUTIVE ACTIONS ON IMMIGRATION (2015), https://www.uscis.gov/archive/2014-executive-actions-on-immigration [perma.cc/46FJ-W6UZ]; Brian Naylor, *After Obama's Action, Immigration Agency Awaits 'A Real Challenge*,' NPR (Nov. 24, 2014, 5:39 PM), https://www.npr.org/transcripts/366352953?storyId=366352953 [perma.cc/TKP8-7S3Y] (describing the front-line role of the USCIS in processing DAPA applications).

189. *See* cases cited *supra* note 3; *see also* Muzaffar Chishti & Faye Hipsman, *Supreme Court DAPA Ruling a Blow to Obama Administration, Moves Immigration Back to Political Realm*, MIGRATION POL'Y INST. (June 29, 2016), https://www.migrationpolicy.org/article/supreme-court-dapa-ruling-blow-obama-administration-moves-immigration-back-political-realm [https://perma.cc/B3KD-WQ77] ("[DAPA's] implementation was quickly challenged by Texas and 25 other states, and enjoined in February 2015 by Andrew Hanen, a federal district judge in Brownsville, Texas.").

190. *See* Texas v. United States (*Texas I*), 787 F.3d 733, 734 (5th Cir. 2015); Texas v. United States (*Texas II*), 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

191. Administrative Procedure Act (APA), 5 U.S.C. § 553(b).

192. *Texas II*, 809 F.3d at 176; *cf.* Texas v. United States, 50 F.4th 498, 511–13 (5th Cir. 2022) (discussing this aspect of DAPA when affirming the vacatur of DACA).

193. *Texas I*, 787 F.3d at 747–54.

authorized by statute and established regulations, connected umbilically to traditional law,[194] and that DAPA was "executive action that is internal policy-setting" rather than "a procedurally invalid legislative rule."[195]

In staking out these three positions, the opinions emphasized the robust nature of the do-not-deport rule embedded in DAPA and DACA. What the majority and dissents agreed on is the power and scope of the rule. All acknowledged that if deferred action applied to an individual, it was effectively a prohibition on deportation. The dispute between the majority and the dissents was over whether this particularly impactful rule was properly categorized as a traditional agency rule, because it was authorized by statute directly or through a valid delegation of discretion or was, instead, so similar to legislation as to be improper. Between these positions—the traditional agency rule and positively enacted legislation—lies a liminality: a do-not-deport rule with a liminal nature.

The legality of DAPA[196] is not the focus of this Article. The dispute over how to categorize the rule is important, because it illustrates that DAPA, and its cousin DACA, act enough like traditional law to wield a similar level of power. While questions may linger about the relationship between DACA and DAPA and traditional legal authority, these questions arise because the programs established a mandate and demanded compliance in the same way as a statute or regulation or other traditional form of law.

2. Detainers and the Do-Not-Release Rule

The immigration detainer is a different example of these robust law-like mandates. The detainer is an enforcement tool, directing state and local law enforcement to continue custody of an individual that ICE suspects of violating immigration law. Like DACA, the detainer's do-not-release rule had a national impact on state and local police jurisdictions nationwide. Moreover, it was essentially a creature of its own making, with a tenuous connection to traditional law.

The two sources of traditional law related to the detainer do not account for the robustness of its do-not-release rule. In 1986, the Anti-Drug Abuse Act authorized the use of an immigration detainer for controlled substance arrests.[197] The language of the Act is narrow. It specifies that detainers apply

194. *Texas II*, 809 F.3d at 189 (King, J., dissenting) ("[T]he benefits of which Plaintiffs complain are not conferred by the DAPA Memorandum . . . but are inexorably tied to DHS's deferred action decisions by a host of unchallenged, preexisting statutes and notice-and-comment regulations . . . ." (citing generally DAPA Memo, *supra* note 102)).

195. *Texas I*, 787 F.3d at 776–77 (Higginson, J., dissenting) (dissenting from the denial of a stay of the preliminary injunction).

196. *See generally Texas I*, 787 F.3d 733 (raising legitimacy issues of agency overreach); *Texas II*, 809 F.3d 134 (discussing legal consequences associated with standing and DAPA generally).

197. *See* Anti-Drug Abuse Act of 1986, ch. 46, § 1751, 100 Stat. 3207, 3207-47 to -48; *see also* Lasch, *Enforcing the Limits*, *supra* note 114, at 182–85; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1363 (2014).

to controlled substance offenses and provides that a federal, state, or local criminal law enforcement official may initiate the request that an immigration official issue a detainer.[198] It also limits detainer requests to circumstances when the law enforcement official "has reason to believe that the [noncitizen entered unlawfully] . . . or . . . is not lawfully present in the United States."[199] Unless the noncitizen is otherwise detained by other officials, DHS "shall effectively and expeditiously take custody of the" noncitizen.[200]

The regulation implementing detainer authority did not limit its use to drug offenses, claiming instead a general federal authority to arrest and detain.[201] The regulation characterized the detainer as "a request" to criminal law enforcement agencies to "advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody . . . when gaining immediate physical custody is either impracticable or impossible."[202] It also authorized police or sheriffs to maintain custody of the individual: Upon receiving a detainer, the law enforcement official "shall maintain custody of the alien for a period not to exceed [forty-eight] hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."[203]

These statutory and regulatory sources bear little resemblance to the broad operation of the detainer as implemented nationwide in the mid-2000s. Despite the forty-eight-hour limit on custody on the face of the detainer form, individuals remained in local jails significantly longer, with one study finding an average period of two weeks to a month, and sometimes up to forty-three days.[204] Detainers resulted in thousands of individuals being detained for lengthy periods, including hundreds wrongfully detained because they were

198. 8 U.S.C. § 1357(d) (permitting ICE to issue a detainer when a "law enforcement official" arrests a noncitizen "for a violation of any law relating to controlled substances").

199. *Id.* § 1357(d)(1).

200. *Id.* § 1357(d).

201. *See* 8 C.F.R. § 287.7(a) (2021); Anti-Drug Abuse Act, § 1751 (amending the Immigration and Nationality Act § 212(a)(23), 8 U.S.C. § 1182(a)(23)); *see also* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10375, IMMIGRATION DETAINERS: BACKGROUND AND RECENT LEGAL DEVELOPMENTS 2 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10375/2 [perma.cc/EYY6-WT7N] (noting that 8 C.F.R. § 287.7 is a conglomeration of "[r]egulations concerning detainers generally and those specific to aliens arrested for drug offenses"); Lasch, *Enforcing the Limits*, *supra* note 114, at 182–85 (describing the history of detainers).

202. 8 C.F.R. § 287.7(a).

203. *Id.* at. § 287.7(d).

204. PRIYA SREENIVASAN, JASON A. CADE & AZADEH SHAHSHAHANI, PROJECT SOUTH, ESCALATING JAILHOUSE IMMIGRATION ENFORCEMENT: A REPORT ON DETAINERS ISSUED BY ICE AGAINST PERSONS HELD BY LOCAL LAW ENFORCEMENT AGENCIES IN GEORGIA, NORTH CAROLINA, AND SOUTH CAROLINA FROM 2016-2018 at 23 (2021), https://www.projectsouth.org/wp-content/uploads/2021/12/120621_Escalating-Jailhouse-Immigration-Enforcement-Report.pdf [https://perma.cc/P3Q3-4HWN].

either U.S. citizens or had other lawful immigrant status.[205] Over time the immigration detainer acquired an aura of mandatory federal authority. Both the regulation and the detainer form were inconsistent about whether the detainer mandated that the state or local police to continue to hold the person in custody or whether the detainer was merely a federal request.

Yet state and local law enforcement agencies across the nation came to understand the detainer as mandatory, requiring them to hold a noncitizen for as long as necessary for immigration officials to take custody.[206] The power of the ICE detainer, and the essence of its liminality, was its national—nearly uniform—acceptance as a federal mandate to law enforcement agencies not to release the targeted individual.[207] Almost every sheriff and every police department in the nation acceded to it as a matter of course.[208] Deportation metrics shot skyward.[209]

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205. *Id.* at 4 (finding that in a three-year period, in the three states studied, ICE wrongfully issued detainers for at least 189 individuals who were not subject to removal proceedings because they were U.S. citizens or had other legal immigrant status). The Eighth Circuit struck down a similar county practice impacting U.S. citizens as unconstitutional discrimination on the basis of national origin. Parada v. Anoka County, No. 21-3082, 2022 WL 17333380, *1–2 (8th Cir. Nov. 30, 2022) (determining that a Minnesota county jail's policy of holding in custody for ICE investigation every detainee born outside the United States, including U.S. citizens, violated the Equal Protection Clause).

206. *E.g.*, Miranda-Olivares v. Clackamas Cnty., No. 12-cv-02317, 2014 WL 1414305, at *3 (D. Or. Apr. 11, 2014). *See* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281, 288 (2013) [hereinafter Lasch, *Preempting Immigration Detainer Enforcement*] (noting that prior to 2020, many state and local officials complied with detainers); Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES (Apr. 18, 2014), https://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-ofimmigrants.html [https://perma.cc/9VG9-W6YL].

207. *See* Preston, *supra* note 206.

208. *See* Lasch, *Preempting Immigration Detainer Enforcement*, *supra* note 206, at 288 (describing state and local compliance with detainers and the increasing resistance to them after 2010); Stumpf, *D(e)volving Discretion*, *supra* note 10, at 1278–79 (noting an increase in litigation over the scope and legality of detainers after 2010 as localities sought to untangle themselves from detainer requirements); SREENIVASAN ET AL., *supra* note 204, at 10 (describing ICE detainers); *see, e.g.*, *Miranda-Olivares*, 2014 WL 1414305, at *3 (observing that Clackamas County viewed the detainer as mandatory); Galarza v. Szalczyk, 745 F.3d 634, 639–40 (3d Cir. 2014) (noting that Lehigh County viewed the detainer as mandatory). *But see, e.g.*, Mercado v. Dallas Cnty., 229 F. Supp. 3d 501, 514–15 (N.D. Tex. 2017) (rejecting the County's argument that immigration detainers were mandated by 8 C.F.R. § 287.7(d)), *abrogated on other grounds by* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018). *But see also* Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES (May 5, 2011), https://www.nytimes.com/2011/05/06/us/06immigration.html [https://perma.cc/9EG3-NZKQ] (reporting that Department of Homeland Security Secretary Janet Napolitano had declared that Secure Communities was "mandatory").

209. *See Latest Data: Immigration and Customs Enforcement Removals ICE Data*, TRAC IMMIGR. (June 2020), https://trac.syr.edu/phptools/immigration/remove [https://perma.cc/CJT3-7CYB] (documenting record numbers of deportations in fiscal years 2008 to 2020); *see also The Role of ICE Detainers Under Bush and Obama*, TRAC IMMIGR. (Feb. 1, 2016), https://trac.syr.edu/immigration/reports/458 [https://perma.cc/HUS4-6JQV] (reporting that the number of detainers resulting in deportation peaked in March 2010).

As with DACA, a government form played a central role in effectuating this liminal rule. The original detainer form exuded federal authority: a signature block for a federal immigration official and the seal of the federal Department of Homeland Security.[210] The mandate appeared in bold as an imperative on the face of the form: "MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS."[211] Further down the page, the form referred to the detainer as a "request[]" to "[m]aintain custody" for no more than forty-eight hours beyond when the noncitizen would otherwise have been released.[212] It then informed the recipient in bold that "you are not authorized to hold the subject beyond these 48 hours," implying that the immigration agency had imbued the state or local law enforcement agency with forty-eight hours of administrative detention power.[213] That show of authority was powerful enough to establish nationwide police cooperation with the detainers despite strong counterpressure from advocates.[214]

The notion that the immigration detainer was in fact a mandate to nonfederal law enforcement officials was dubious from the start. The Tenth Amendment prohibits federal commandeering of state agents.[215] Neither the statute, the regulation, nor the form itself clearly mandated obedience to the detainer. The detainer statute contemplated state or local initiation of the

210. U.S. DEP'T OF HOMELAND SEC., FORM I-247 IMMIGRATION DETAINER: NOTICE OF ACTION 1, https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf [https://perma.cc/KL29-SEAM].

211. *Id.*

212. *Id.*

213. *Id.* In *Miranda-Olivares*, Clackamas County argued that the detainer was mandatory, based in part on the form's caption, which instructed in all capitals that the County was to "('MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS')." *Miranda-Olivares*, 2014 WL 1414305, at *5. The County also pointed to the body of the form which asserted that the authority for ICE to order the County to detain "flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency 'shall maintain custody of an alien' once a detainer has been issued by DHS." *Id.* Clackamas County further explained that it interpreted "'shall' as extinguishing any discretion by a local law enforcement agency once ICE issues the detainer." *Id.*; *see also* Lasch, *Rendition Resistance*, *supra* note 9, at 205–08 (analyzing Form I-247 and the uncertainty raised by the language used in different versions).

214. *See, e.g.*, Tim Henderson, *More Jurisdictions Defying Feds on Deporting Immigrants*, PEW (Oct. 31, 2014), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants [https://perma.cc/D3KF-NY2W]; Alejandra Molina, *Immigrant Rights Advocates Protest San Bernardino County Sheriff's Cooperation with ICE*, SUN (July 28, 2017, 8:32 PM), https://www.sbsun.com/2017/07/28/immigrant-rights-advocates-protest-san-bernardino-county-sheriffs-cooperation-with-ice [https://perma.cc/L2AM-DJSQ]; Lizette Alvarez, *Protesters Vow Defiance After Miami Heeds Immigration Order*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/miami-mayor-carlos-gimenez.html [https://perma.cc/JB4H-ZSRF] (describing this history of detainer use, particularly in Miami-Dade County).

215. *See* U.S. CONST. amend X. *See generally* Printz v. United States, 521 U.S. 898 (1997) (standing for the proposition that the federal government cannot commandeer the official services of local officers); *see also* Lasch, *Federal Immigration Detainers*, *supra* note 114, at 700 (describing the Tenth Amendment challenge to the detainer regulation as commandeering state and local officials).

detainer.[216] The regulation characterized the detainer as a request, as did the detainer form.[217] The Fourth Amendment loomed once probable cause for the initial stop expired, putting in question the constitutionality of continued custody based on the detainer form.[218]

Yet the habit of obedience to the detainer was so ingrained that the mandatory detainer rule continued to exert its influence even after the original basis for probable cause to arrest was gone.[219] Despite the limited statutory and regulatory authority, in practice, detainers were used for arrests of any sort and for prolonged periods of custody that extended far beyond forty-eight hours.[220]

The mandatory detainer thus acquired an aura of compulsion and a breadth of impact that rendered it robust. It was potent enough to dictate the actions of nonfederal officials and influential enough to convince a nation of criminal law enforcement professionals to obey a seeming mandate to prolong the custody of countless individuals.

3. Administrative Closure and the Do-Not-Remove Rule

Like DACA and the mandatory detainer rule, administrative closure originated beyond traditional law but had tremendous impact on removals of noncitizens. The use of administrative closure as a comprehensive barrier to removal is not explicitly described in a statute or regulation—that use is liminal, existing in the penumbra of traditional law.[221] Still, the "do-not-remove" rule of administrative closure has the shape and power of a traditional legal rule.

The relationship between traditional law and administrative closure was at the heart of legal challenges to its existence. Many agency powers derive

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216. *See supra* notes 197–200 and accompanying text.

217. *See supra* notes 209–13 and accompanying text.

218. *Miranda-Olivares*, 2014 WL 1414305, at *9–10 (concluding that "it was not reasonable for the Jail to believe it had probable cause to detain Miranda-Olivares based on the box checked on the ICE detainer").

219. *Compare Miranda-Olivares*, 2014 WL 1414305, at *11 (finding Miranda-Olivares's detention was extended beyond the probable cause period "based exclusively on the ICE detainer"), *with* City of El Cenizo v. Texas, 890 F.3d 164, 186–88 (5th Cir. 2018) (rejecting a Fourth Amendment "facial challenge" to a state statute requiring compliance with immigration detainers (citing Senate Bill 4, TEX. GOV'T CODE ANN. § 752.053 (West 2017))).

220. *See* Lasch, *Enforcing the Limits*, *supra* note 114, at 179–82 (highlighting "ICE practices in Irving, Texas [as] emblematic of the" indiscriminate use of ICE detainers); Molly F. Franck, Note, *Unlawful Arrests and Over-Detention of America's Immigrants: What the Federal Government Can Do to Eliminate State and Local Abuse of Immigration Detainers*, 9 HASTINGS RACE & POVERTY L.J. 55, 56–57, 72–74 (2012) (noting that in practice, detainers are used to justify detention far beyond the forty-eight-hour rule, sometimes extending weeks or months beyond the required release).

221. *See supra* Section I.B.3.

from broad statutory delegations.[222] While statutory interpretation can fill gaps in legislative pronouncements, too much distance from statutory or regulatory authority can doom administrative rules.[223] In *Castro-Tum*, Attorney General Sessions drew on this concept of statutory distance to declare that "administrative closure" was not authorized by statute or regulation, nor delegation from the Attorney General.[224]

Later, in his opinion overruling *Castro-Tum*, Attorney General Garland relied on the broad language of regulations authorizing immigration judges to "'take any action consistent with their authorities . . .' that 'is appropriate and necessary for the disposition' of [their] cases."[225] Citing the long history of administrative closure, the Attorney General reinstated the immigration courts' authority to use it, at least until a new regulation was promulgated.[226]

Setting aside the merits of these decisions, the tussle over authority for administrative closure illustrates the gap between traditional law and liminal legal rules.[227] Despite the tenuousness of the connection to formal law, the do-not-remove rule of administrative closure operates like a traditional legal rule. Unlike a pure exercise of administrative discretion, administrative closure as a form of relief from removal has specific criteria shaped by precedent.[228] The breadth of its use as a form of relief stems from the agency memos that direct immigration prosecutors and judges toward applying closure regularly

222. *E.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

223. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989).

224. Matter of Castro-Tum, 27 I. & N. Dec. 271, 274, 282–83 (U.S. Att'y Gen. 2018) (asserting that "Congress has never authorized administrative closures in a statute, and Department of Justice regulations only permit administrative closure in specific categories of cases," and declaring that "[n]o Attorney General has delegated such broad authority"), *overruled by* Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (U.S. Att'y Gen. 2021).

225. *Matter of Cruz-Valdez*, 28 I. & N. Dec. at 328 (quoting *Matter of Castro-Tum*, 27 I. & N. Dec. at 284).

226. *Id.* at 328–29.

227. *See* Ray, *supra* note 171, at 2083–84.

228. *See supra* Section I.B.3 (describing the development of precedent recognizing administrative closure and the reasons for granting it); Matter of Avetisyan, 25 I. & N. Dec. 688, 696 (B.I.A. 2012) (listing as factors for consideration: "(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the Immigration Judge or the appeal is reinstated before the Board"), *reaffirmed by Matter of Cruz-Valdez*, 28 I. & N. Dec. at 329; Bohman, *supra* note 151, at 209–10 (listing and critiquing the limits on these factors).

except if the case is a removal priority or the individual favors proceeding with the case.[229]

These directives made administrative closure a regular rather than an exceptional outcome. They also established the purpose for administrative closure: to adjudicate only cases that meet the criteria, leaving the remainder to be resolved in other ways or not at all.[230] They graduated the do-not-remove mandate of administrative closure to a liminal rule.

The impact of administrative closure also reflects its robustness. Administrative closure has had a powerful influence on expulsion of noncitizens. Compared to an annual average of about 11,000 cases in the fifteen years prior to 2020, immigration judges administratively closed an average of over 17,500 cases per year in the four years between 2012 and 2017.[231] As Nina Rabin has noted, administrative closure, in combination with continuances and similar measures, "kept removal from becoming imminent, and allowed for a degree of social integration during the years that the visa application kept [people] in limbo."[232]

B. LIMINAL LAW IS STICKY

The second characteristic of liminal law is that it is sticky.[233] Traditional law, such as a statute, a regulation, or a published court decision, is durable by design. Revising or abolishing traditional law requires overcoming barriers built into the processes for changing the law: passing repeal legislation, rescinding a regulation, overturning or modifying a precedent through new cases and appeals, striking down legislation, or invalidating regulations.[234]

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229. *See supra* notes 143–46 (describing agency memos establishing administrative closure criteria and scope).

230. *See* Family, *Immigration Adjudication Bankruptcy*, *supra* note 135, at 1042–43.

231. *See The Life and Death of Administrative Closure*, *supra* note 132.

232. *See* Rabin, *supra* note 15, at 592 ("ICE and/or the immigration courts were highly likely to terminate or administratively close [noncitizens'] proceedings upon discovery of a pending visa application, or at least grant continuances generously to allow time for adjudication of the visa application.").

233. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–09 (2000) (coining the term "sticky" to describe norms that resist change, and arguing that lawmakers should apply "gentle nudges" rather than "hard shoves" in changes to the law in order to avoid resistance due to sticky societal norms).

234. *See* U.S. CONST. art. V; Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 622–27 (2001) (describing the role of stare decisis in maintaining pre-existing common law rules); Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 911–12 (2015) (describing three potential influences on judicial defiance of new laws or doctrines: resistance to increased time and effort, "aversion to the increased cognitive difficulty of their decisions under complex new laws," and "strong preferences for familiar, status quo doctrines"); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1031, 1077 (2004) (calling Article V of the U.S. Constitution a "formidable obstacle" to constitutional amendment-making); Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 902–07 (2016) [hereinafter Varol, *Constitutional Stickiness*] (describing "constitutional stickiness" and the "high serial similarity" in constitutional substance

Changing traditional law means expending time, money, effort, and political capital.[235] These barriers to change are design features of traditional law. They operate to stabilize the law, ensuring that once created, a legal rule will endure unless significant effort is expended to change it.[236] For better or for worse, formal legal rules have staying power. They are sticky.

Liminal law seems far more precarious. It has none of these stabilizing features, although as we will see, it performs a stabilizing function.[237] Lacking the procedural guardrails that traditional rules rely on for stability, liminal rules seem gossamer. They hang in the balance, seemingly easy to topple. Eliminating liminal law appears to merely require a new executive proclamation or a new agency memo that retracts the old one.[238] In theory, officials could unilaterally and expediently eliminate DACA, the mandatory ICE detainer, and administrative closure's relief function by undoing the steps that created them. They could consign to obsolescence the forms these rules rely on. They could shutter or change the agency systems that received, processed and adjudicated the relief or enforcement requests. In fact, each of these liminal rules have undergone efforts to get rid of them. Yet because of their stickiness, each survived.

1. The Stickiness of DACA

DACA is a clear example of the stickiness of liminal rules even in the face of their precariousness. DACA's origins drew a roadmap to its ostensibly easy elimination. When President Trump sought to rescind DACA in 2017, his administration simply backtracked the steps that the Obama Administration had taken to establish it. Mirroring President Obama's speech in the Rose Garden announcing the creation of DACA, President Trump made a public statement that he would rescind DACA.[239] Undoing Secretary Napolitano's 2012 issuance of the foundational DACA memo, President Trump's Acting

even as constitutions are amended); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 85–90, 136–37, 143 (2018) (summarizing critiques of the "ossification" of administrative rulemaking and positing that sticky regulations, which cannot easily be changed or withdrawn, have a stabilizing effect on regulated entities).

235. Nielson, *supra* note 234, at 140–41 (describing the high costs of both ossification and litigation over "sticky regulations"); *see also* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2328 & n.162 (2015) (collecting ossification literature).

236. *See* Ackerman, *supra* note 234, at 1031, 1077 (describing the barriers to constitutional change); Nielson, *supra* note 234, at 90 ("Because regulated parties know that an agency must survive a procedural gauntlet to change a regulatory scheme, they can have more confidence in that scheme's stability.").

237. *See infra* Section III.C.3 (discussing the stabilizing function of liminal law).

238. *See* Benjamin Crouse, Comment, *Worksite Raids and Immigration Norms: A "Sticky" Problem*, 92 MARQ. L. REV. 591, 607–08 (2009).

239. *Compare* Press Release, Barack Obama, *supra* note 100 (establishing DACA), *with* Press Release, Donald J. Trump, President of the U.S., Statement from President Donald J. Trump (Sept. 5, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-7 [https://perma.cc/8Z2W-4FTK] (declaring intent to rescind DACA).

Secretary of Homeland Security issued the memo that declared DACA unlawful.[240] As the Supreme Court noted in the challenge to that action, "[t]he dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may."[241] What had been so simply done could simply be undone.

Nevertheless, DACA turned out to be extraordinarily sticky. The prolonged efforts of the Trump Administration to eliminate DACA illustrate its resistance to termination. At a campaign rally in 2016, candidate Donald Trump promised to end DACA, declaring that he would "immediately terminate President Obama's two illegal executive amnesties."[242] After the election, when President Trump faced the reality of terminating the program, DACA's stickiness emerged. The President wavered, declaring that he "love[s] these kids . . . and" that he "[found] it very hard doing what the law says exactly to do."[243] Only after public shaming from influential members of his base did he order DACA's termination.[244]

Even then, the first move to rescind DACA was so vulnerable to judicial review as to raise eyebrows about the sincerity of the attempt.[245] Instead of laying out policy reasons for rescinding the program, Acting Secretary of Homeland Security Elaine Duke relied wholly on Attorney General Jeff Sessions's letter concluding that DACA was contrary to legal doctrine.[246] This purely doctrinal rationale for rescission presented a broad target for an APA challenge. Three district courts immediately blocked the rescission.[247] The Supreme Court agreed that DHS had unlawfully failed to consider the option of continuing the policy of forbearance from deportation without collateral

240. DACA Memo, *supra* note 100; Duke Memo, *supra* note 108.

241. DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).

242. *Transcript of Donald Trump's Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html [https://perma.cc/JC7A-2VP5] (referring to DACA and DAPA as the "two illegal executive amnesties").

243. *Trump Says He Wants to Deal with DACA Recipients 'With Heart,'* FOX NEWS (Feb. 16, 2017, 3:21 PM), https://www.foxnews.com/politics/trump-says-he-wants-to-deal-with-daca-recipients-with-heart [https://perma.cc/Y5D9-ABKR].

244. *See, e.g.*, Joe Concha, *Coulter Blasts Trump on DACA: 'They Can Stay. You Must Go,'* HILL (Nov. 12, 2019, 4:31 PM), https://thehill.com/homenews/media/470133-coulter-blasts-trump-on-daca-they-can-stay-you-must-go [https://perma.cc/L2U9-ECRP].

245. *See* Duke Memo, *supra* note 108; *Regents of the Univ. of Cal.*, 140 S. Ct. at 1911–15 (observing that "[Acting Secretary] Duke did not appear to appreciate the full scope of her discretion" when she issued the memorandum winding down DACA).

246. *See* Duke Memo, *supra* note 108; *Regents of the Univ. of Cal.*, 140 S. Ct. at 1912 (noting that Acting Secretary Duke had the discretion to "remove[] benefits eligibility while continuing forbearance," but that "[s]he instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation").

247. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 223–24, 234–35 (D.D.C. 2018), *aff'd sub nom. Regents of the Univ. of Cal.*, 140 S. Ct. 1891; Regents of the Univ. of Cal. v. DHS, 279 F. Supp. 3d 1011, 1029–33, 1049–50 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *rev'd in part, vacated in part*, 140 S. Ct. 1891 (2020); Batalla Vidal v. Duke, 295 F. Supp. 3d 127, 150, 152–54 (E.D.N.Y. 2017), *aff'd in part sub nom. Regents of the Univ. of Cal.*, 140 S. Ct. 1891.

benefits like work authorization, and it had also failed to consider any reliance interests by DACA recipients.[248] The Court declined to address the post-litigation policy reasons offered in the later rescission memo from DHS Secretary Kirstjen Nielsen.[249]

DACA continued to boomerang between termination and stability. In December 2020, a federal district court in New York issued an injunction requiring the DHS to continue to accept new DACA applications.[250] Seven months later in July 2021, a Texas district court judge declared that DACA violated the APA and enjoined the Administration from granting the initial DACA applications that the New York district court had ordered the agency to accept.[251]

In August 2022, DHS promulgated a regulation that essentially codified DACA using the notice-and-comment process of the APA.[252] Just as the regulation was set to go into effect, the Fifth Circuit affirmed the Texas district court's conclusion that DACA violated the APA.[253] It stayed the injunction against DACA, however, until the district court reviewed the new DACA rule.[254] The Fifth Circuit's holding maintained the status quo for current DACA recipients, allowing USCIS to continue to accept DACA renewals.[255]

DACA's near-death experiences demonstrate both its precarity and its stickiness. DACA had survived, though not unscathed. As Jennifer Chacón noted, "DACA protections proved somewhat 'sticky' in ways that its supporters hoped it would" but the litigation boomerang had "le[ft] the program on a grim life support system."[256] While the means of creating the program had seemed to inscribe DACA with the instructions for its dissolution, the do-not-deport rule at its heart proved notably difficult to undo.[257]

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248. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (stating that "the rescission memorandum contains no discussion of . . . the option of retaining forbearance without benefits" and that "Duke also failed to address whether there was 'legitimate reliance' on the DACA Memorandum" (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996))).

249. *Id.* at 1907–10 (stating that "Secretary Nielsen[] . . . offered three 'separate and independently sufficient reasons' for the recission" of DACA, but that they were "impermissible *post hoc* rationalizations" not properly before the Court (citation omitted)).

250. Batalla Vidal v. Wolf, No. 17-cv-5228, 2020 WL 7121849, at *2 (E.D.N.Y. Dec. 4, 2020).

251. Texas v. United States, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021), *aff'd in part, vacated in part*, 50 F.4th 498 (5th Cir. 2022).

252. Deferred Action for Childhood Arrivals (DACA), 87 Fed. Reg. 53,152, 53,152, 53,188–91 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

253. Texas v. United States, 50 F.4th 498, 514, 521–25 (5th Cir. 2022).

254. *Id.*

255. *Id.* at 529–30.

256. Chacón, *Citizenship Matters*, *supra* note 89, at 43–44 ("Even before the attempted rescission of [DACA], the immigration enforcement efforts of the Trump administration highlighted the fragility of DACA.").

257. DAPA is a useful contrast as a nontraditional legal rule that lacked stickiness. DAPA's do-not-deport rule toppled almost immediately when the Fifth Circuit enjoined its implementation; the government later retracted it. *See* Texas v. United States (*Texas II*), 809 F.3d 134, 186 (5th

2. The Stickiness of Detainers

The mandatory immigration detainer provides a still earlier example of a seemingly precarious yet sticky liminal rule. In 2012, an Oregon resident challenged as unconstitutional a county sheriff's decision to hold her in prolonged custody pursuant to an immigration detainer.[258] The Oregon district court ruled that the detainer was a request and not a mandatory rule, exposing the county to liability for unlawful arrest without probable cause.[259] The decision exposed the doctrinal and practical instability of the rule that the detainer was mandatory for law enforcement. It opened counties and cities that detained individuals pursuant to the detainer to liability for violating individual constitutional rights.[260] Once exposed, obedience to the detainer fell like dominoes in locality after locality.[261] Jurisdictions across the nation issued policies prohibiting law enforcement officers from agreeing to civil immigration detention requests from ICE.[262] The mandatory detainer rule was on the ropes.

Later that year, the mandatory detainer rule suffered a seemingly fatal blow from on high. In a November 2014 memorandum, DHS Secretary Jeh Johnson discontinued the Secure Communities program, replacing it with a program that set priority levels for immigration enforcement.[263] The same memo made clear that an immigration detainer was a "request" to state and local officials rather than a mandatory obligation and that it was to be used rarely, if at all.[264] From one day to the next, the liminal do-not-release rule that had been the key to Secure Communities' high deportation levels seemed to evaporate.

The stickiness of the mandatory detainer rule played out both geographically and politically. Despite the rule's constitutionally shaky

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Cir. 2015), *aff'd*, 579 U.S. 547 (2016); Memorandum from John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Joseph B. Maher, Acting Gen. Couns., Michael T. Dougherty, Assistant Sec'y for Border, Immigr., & Trade Pol'y 1–3 (June 15, 2017) [hereinafter Kelly DAPA Cancellation Memo], https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf [https://perma.cc/FGC7-3DJP].

258. Miranda-Olivares v. Clackamas Cnty., No. 12-cv-02317, 2014 WL 1414305, at *1–2, *10–11 (D. Or. Apr. 11, 2014).

259. *Id.* at *8.

260. *Id.*

261. *See* Lasch et al., *Understanding "Sanctuary Cities,"* *supra* note 127, at 1732 (citing Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014)).

262. *Id.* at 1732; Lai & Lasch, *Crimmigration Resistance*, *supra* note 127, at 602–08 (observing that some jurisdictions embraced the "sanctuary" label as they "sought to celebrate diversity and renew commitments to nondiscrimination").

263. November 2014 Secure Communities Memo, *supra* note 123, at 1–2 ("directing . . . ICE . . . to discontinue Secure Communities" and replace requests to detain individuals with requests for notification to ICE of a person's release from nonfederal custody except in special circumstances).

264. *Id.*

foundation, the threat of municipal liability, and the diversion of state and local resources for administrative immigration purposes, many localities clung to the detainer. Criminal law enforcement jurisdictions in the Midwest and South continued to treat it as a requirement.[265] In North Carolina, South Carolina, and Georgia, the number of detainers issued multiplied in the years following the *Miranda-Olivares* decision.[266] More than half of detainers issued in those states resulted in federal immigration detention for the individual in state or local custody.[267] Within some states, jurisdictions split, with some declaring themselves detainer-free as others committed to obeying them. In Texas, Austin's declaration that it would reject ICE detainers was met with state legislation requiring all Texas jurisdictions to obey detainers.[268]

The Trump Administration sought to resurrect the nationwide reach of the mandatory detainer rule. It revived the Secure Communities program and stepped up the issuance of detainers across the nation.[269] It threatened non-detainer jurisdictions with denial of federal funding for law enforcement.[270] It entered into section 287(g) agreements with an increased number of law enforcement agencies, deputizing police and sheriffs as immigration agents and enabling the expansion of detainer use in those jurisdictions.[271] One federal

265. *See* Chen, *Trust in Immigration Enforcement*, *supra* note 127, at 35–42 (describing a continuum of cooperation versus noncooperation practices regarding detainers).

266. SREENIVASAN ET AL., *supra* note 204, at 4 ("Between . . . 2016 and . . . 2018, the number of detainers issued by ICE doubled in North Carolina, nearly tripled in South Carolina, and nearly quadrupled in Georgia.").

267. *Id.* at 21. Some "[l]ocal law enforcement agencies routinely [detain] immigrants on behalf of ICE even in the absence of formal [detainer] agreements." *Id.* at 4.

268. Senate Bill 4, TEX. GOV'T CODE ANN. § 752.053, *invalidated on other grounds by* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018) (upholding provisions that required municipalities to accede to detainers).

269. Interior Enforcement Order, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017), *revoked by* Exec. Order No. 13,993 (Jan. 20, 2021); *see also Use of ICE Detainers: Obama vs. Trump*, TRAC IMMIGR. (Aug. 30, 2017), https://trac.syr.edu/immigration/reports/479 [https://perma.cc/925P-JDFT] (noting that "detainer [issuance] rose rapidly" after Trump took office, though there was an increase of detainer issuance prior to the 2016 presidential election).

270. Interior Enforcement Order, 82 Fed. Reg. at 8,801 ("[J]urisdictions that willfully refuse to comply . . . [would] not [be] eligible to receive [f]ederal grants . . . ."). Litigation quickly followed the executive order. *See* City of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018) (striking down as unconstitutional the withholding of federal funding without congressional authorization based on violation of separation of powers and the spending power); City of Seattle v. Trump, No. 17-497, 2017 WL 4700144, at *9 (W.D. Wash. Oct. 19, 2017) (holding that the executive order violated the Tenth Amendment, the Spending Clause, and separation of powers principles); *see also* Lai & Lasch, *Crimmigration Resistance*, *supra* note 127, at 557–63 (describing sanctuary jurisdiction defunding during the Trump Administration); *Cities Win Immigration Policing Dispute With US Government*, ASSOCIATED PRESS (Apr. 10, 2021), https://bit.ly/3uUHrAh [https://perma.cc/8GCQ-M5YC] (reporting that the U.S. Department of Justice dropped the appeal from litigation over the federal government's conditioning federal funding on local law enforcement cooperation in policing immigrants).

271. *See* Reva Dhingra, Mitchell Kilborn & Olivia Woldemikael, *When Local Police Cooperate with ICE, Latino Communities Under-Report Crime. Here's the Data*, WASH. POST (Feb. 5, 2021, 7:00

appellate court affirmed the mandatory nature of the detainer if a state or locality explicitly recreated the mandate through legislation.[272] The nation divided between those jurisdictions that embraced detainer requests and those that refused them.[273] Together, these developments resurrected the detainer in parts of the United States where they were functionally treated as mandatory.

3. The Stickiness of Administrative Closure

The stickiness of administrative closure belies its precarity. Immediately after its establishment as a docket management tool for the immigration courts, BIA precedent gutted it, handing to the immigration prosecutor a veto over case closures.[274] After the revival of administrative closure in *Matter of Avetisyan*[275] and *W-Y-U-*[276] and robust application in the years following, *Matter of Castro-Tum* again deflated administrative closure by declaring that Congress had not authorized it.[277] In combination with the Trump Administration's removal of DHS's prosecutorial priorities, *Castro-Tum* brought administrative closure to a halt.[278] Its precariousness, in sum, lay in its vulnerability to change in agency policy.

Like DACA and the detainer, administrative closure resurrected itself, now for the second time and with an explicit recognition of its stickiness. In 2021, when *Matter of Cruz-Valdez* revived administrative closure, the case laid out the decades-long history of judicial use of the tool. It relied explicitly on that "long-standing practice" to overturn *Castro-Tum*. *Cruz-Valdez* set the clock

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AM), https://www.washingtonpost.com/politics/2021/02/05/when-local-police-cooperate-with-ice-latino-communities-under-report-crime-heres-data [https://perma.cc/3BAK-TKSF] ("Trump also reinstituted the Secure Communities program[—]started under George W. Bush in 2008 and first expanded and then dismantled under Barack Obama in 2014 . . . .").

272. *City of El Cenizo*, 890 F.3d at 191 (upholding a Texas law requiring municipalities to accede to detainers and holding that "Texas can 'commandeer' its municipalities in this way").

273. *See* Lasch et al., *Understanding "Sanctuary Cities," supra* note 127, at 1736–52 (describing five principal legal and policy initiatives adopted by sanctuary jurisdictions in response to the Trump Administration's "deportation apparatus"). The presence of detainer agreements was associated with other regional immigration restrictive practices, including slower adjudication times for naturalization applications at USCIS offices located in jurisdictions with 287(g) detainer agreements. Emily Ryo & Reed Humphrey, *Citizenship Disparities*, 107 MINN. L. REV. 1, 40–43 (2022).

274. *See supra* Section I.B.3 (describing history of administrative closure); *see also* Matter of Gutierrez-Lopez, 21 I. & N. Dec. 479, 481–82 (B.I.A. 1996) (finding that administrative closure of a case is inappropriate when either party expresses opposition), *overruled by* Matter of Avetisyan, 25 I. & N. Dec. 688 (B.I.A. 2012).

275. *Matter of Avetisyan*, 25 I. & N. Dec. at 697, *overruled by* Matter of Castro-Tum, 27 I. & N. Dec. 271 (U.S. Att'y Gen. 2018), *reaffirmed by* Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (U.S. Att'y Gen. 2021).

276. Matter of W-Y-U-, 27 I. & N. Dec. 17, 17–18 (B.I.A. 2017), *overruled by Matter of Castro-Tum*, 27 I. & N. Dec. at 272, *reaffirmed by Cruz-Valdez*, 28 I. & N. Dec. at 329.

277. *Matter of Castro-Tum*, 27 I. & N. Dec. at 274, 282–83, *overruled by Cruz-Valdez*, 28 I. & N. Dec. at 329.

278. *See supra* Section I.B.3.

back to 2012, when prior BIA cases had recognized the judicial power to close and re-calendar cases in order to provide a pause in removal proceedings.[279]

C. *LIMINAL LAW IS IN TRANSITION*

Liminal rules are often in transition, moving either toward formalization or toward extinction. This movement results from the tension between their three characteristics, which exerts pressure in both directions. Their robustness—that is, their potency as compared to traditional legal rules—in combination with their stickiness, pulls them toward formalization as statutes or regulations. Their fragility, especially their origins in the crucible caused by the ossification of traditional law, renders them vulnerable to toppling.

1. DACA in Transition

DACA is either a step toward legislation creating lawful status for certain immigrant youth or a step away from it. DACA followed the near-passage of the DREAM Act, which would have carved out a traditional statutory path to lawful status for certain noncitizens who arrived in the United States as children.[280] After the DREAM Act lost by the narrowest of votes in 2010,[281] DACA stepped in to protect the same group but with more precarious legal protection.[282] By 2017, DACA had swung toward extinction as a result of the Trump Administration's attempt to rescind it.[283] By 2022, DACA had pendulated from the solidity of a presidentially sanctioned administrative protection to the cliff's edge of judicial invalidity, to the formal stability of rulemaking, to the precariousness of review by courts that had invalidated it.[284] DACA, therefore, was a liminal rule in transition either toward codifying the status of DACA recipients or away, toward its own destruction.[285]

279. *See Matter of Cruz-Valdez*, 28 I. & N. Dec. at 328–29; *supra* Section I.B.3.

280. *See* Development, Relief, and Education for Alien Minors ("DREAM") Act of 2010, S. 3827, 111th Cong. § 3 (2010); *supra* note 100.

281. *See* ANDORRA BRUNO, CONG. RSCH. SERV., RL33863, UNAUTHORIZED ALIEN STUDENTS: ISSUES AND "DREAM ACT" LEGISLATION 17 (2012).

282. *See supra* note 100.

283. *See supra* notes 233–44 and accompanying text.

284. *See supra* Section II.B.1.

285. *See generally* American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021) (proposing additional protections for youth in precarious immigration status); Dream Act of 2021, S. 264, 117th Cong. (2021) (proposing additional protections for youth in precarious immigration status); U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021) (proposing a path to earned citizenship); U.S. Citizenship Act of 2021, S. 348, 117th Cong. (2021) (proposing a path to earned citizenship); *see also* AM. IMMIGR. COUNCIL, THE DREAM ACT: AN OVERVIEW 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_an_overview.pdf [https://perma.cc/FK2R-892A] (providing an analysis of the various Dream Acts).

2. Detainers in Transition

The immigration detainer is a liminal law in transition on multiple levels. Its central role in the Secure Communities program had endowed it with legitimacy and ubiquity. A legal challenge based in traditional principles of constitutional law and the potential for massive municipal liability nudged it toward extinction. The DHS memo that dismantled Secure Communities seemed to complete the transition from national ubiquity to near disuse. Yet state and local practices and legislation that embraced the detainer impelled it in the other direction. The Trump Administration's attempt to revive the national use of the detainer sought to embed the detainer in formal law as elements of section 287(g) agreements and as a criterion for federal funding for law enforcement agencies. The detainer's do-not-release rule has remained in transition, battered but retaining its shape as a mandate to detain.

The second level on which the detainer is in transition is from the federal level to the state level. The demise of the Secure Communities program did not end detainer use. Rather, the detainer's claim of legitimacy shifted from the federal to the state level in jurisdictions where states and localities authorized its use. Texas's detainer law, for example, resurrected the mandatory do-not-release rule as a matter of state law, requiring localities to obey detainers.[286] A contrasting example is Washington state, which implemented sanctuary laws in 2019 and 2020 that prohibited local jurisdictions from acceding to detainers.[287] Even so, several jurisdictions across Washington continued to respond to detainers or crafted local policies to avoid the new law.[288]

3. Administrative Closure in Transition

Administrative closure is a final example of a liminal rule in transition from liminality to formal law. After *Castro-Tum*'s deflation of immigration judges' authority to administratively close cases, DHS finalized a regulation to

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286. Senate Bill 4, TEX. GOV'T CODE ANN. § 752.053, *invalidated on other grounds by* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018) (upholding provisions that required municipalities to accede to detainers).

287. *See Protecting Immigrant Rights: Is Washington's Law Working?*, UNIV. WASH. CTR. HUM. RTS. (Sept. 2, 2021, 2:10 PM), https://jsis.washington.edu/humanrights/2021/08/11/protecting-immigrant-rights-is-washingtons-law-working [https://perma.cc/PNX2-P7K8]; Troy Brynelson, *Clark County Jail's Communications With ICE Raise Legal Questions*, OPB (July 2, 2021, 3:01 PM), https://www.opb.org/article/2021/07/01/clark-county-jail-communications-with-ice-raise-legal-questions [https://perma.cc/V5EZ-8AGM]; Troy Brynelson, *Report: Washington Police Agencies Continued Working with ICE Despite Sanctuary Laws*, OPB (Aug. 11, 2021, 4:41 PM), https://www.opb.org/article/2021/08/11/washington-police-departments-ice-federal-immigration-sanctuary-laws [https://perma.cc/273T-RCBA].

288. *See Protecting Immigrant Rights: Is Washington's Law Working?*, *supra* note 287. In Okanogan County, Washington, "officials developed . . . new . . . requirements to justify holding inmates [for forty-eight] hours beyond their release date" to line up with detainer practice. *Id.* In other counties, detainers were not officially honored, but a review of the communications between jail officials and federal agents suggested that local officials were unofficially obeying detainers. *Id.* Clark County jail officials did not prolong custody, but routinely notified ICE of inmate releases. *Id.*

essentially codify that limitation.[289] The regulation would have completed the transition from a liminal rule to no rule at all if a district court had not enjoined the regulation and resurrected the status quo. The rule reversed direction toward codifying administrative closure when the Biden Administration began work on a revised regulation that *Cruz-Valdez* hinted would restore administrative closure.[290] These undulations reflect not just the stickiness of the rule but its pendulum swing from near-extermination to the traditional garb of a regulation.

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The transitional quality of these rules illustrates the precarity of liminal legal rules. Without the barriers to change that characterize traditional legal rules, liminal rules remain in an in-between state, without the durability of statutes, regulations, and judicial precedent. Yet, despite this apparent precarity, liminal law is sticky. It resists its own demise.[291] This peculiar combination of apparent precarity and stickiness results in liminal rules that have outsized impact yet exist in a state of flux.

While this Article relies on three case studies to derive the characteristics and scope of liminal law, liminal rules seem to be legion in immigration law and may populate other areas of law, as well. Immigration parole, which permits an inadmissible noncitizen to be physically present in the United States but does not provide lawful status,[292] has liminal characteristics. It originated in limited form as an administrative construct, without a statutory basis.[293] Parole's origin illustrates both its distance from traditional "hard" law and its precariousness. Parole then expanded to situations in which a noncitizen had an opportunity to adjust their immigration status to that of a lawful permanent resident, testify in a federal criminal trial, join the military, or naturalize as a U.S. citizen.[294] In 1952, it transitioned from its liminal state to a statutory form when Congress passed the INA.[295]

289. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,600 (Dec. 16, 2020) ("[F]ree-floating authority to unilaterally administratively close cases is in significant tension with existing law, including regulations and longstanding Board case law.").

290. *See* Matter of Cruz-Valdez, 28 I. & N. Dec. 326, 329 (U.S. Att'y Gen. 2021) ("Because *Castro-Tum* departed from long-standing practice, it is appropriate to overrule that opinion in its entirety and restore administrative closure pending the reconsideration of the 2020 rule through notice-and-comment rulemaking . . . .").

291. Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409, 444 (2014) (observing that the passage of time can "alter the existing equilibrium" and create consensus on issues that previously were divisive or contested).

292. *See* Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5)).

293. *See* Heeren, *supra* note 7, at 1179–81.

294. *See* Matter of R-, 3 I. & N. Dec. 45, 46–47 (B.I.A. 1947) (listing uses of parole).

295. *See* McCarran-Walter Act, § 212(d)(5); 8 U.S.C. § 1182(d)(5)(A).

Liminal law is not always purely administrative, as the immigration detainer illustrates. An example of judicially-created liminal immigration law is the rule softening the immigration consequences of a criminal conviction. This rule began traditionally, as a power that Congress conferred on criminal sentencing judges to make a "judicial recommendation against deportation" ("JRAD") when sentencing a noncitizen for a crime.[296] Such recommendations were uniformly followed.[297] Congress repealed the JRAD in 1990,[298] but it reappeared in a much softer form as a liminal rule. Criminal courts across the country adopted rules requiring judges and defense counsel to advise noncitizen defendants considering a plea deal when that plea may have immigration consequences.[299] This liminal rule, requiring the criminal justice system to moderate the fairness of crime-based deportation, transitioned to traditional law when the Supreme Court established that the Fifth Amendment required counsel to adequately advise of immigration consequences and suggested that creative negotiation may result in avoidance of deportation.[300]

III. UNDERSTANDING LIMINAL IMMIGRATION LAW

This Part looks under the hood of liminal rules. It assesses *what* kind of "law" liminal rules are within the lexicon of law. It theorizes *how* liminal law acquired its telltale characteristics, especially its stickiness. This Part then assesses *why* liminal law exists—providing flexibility, a contested legitimacy, and a measure of stability to an ossified area of law. Finally, we address *who* liminal law impacts, exploring the racialization of law itself.

A. WHAT: HARD LAW, SOFT LAW, AND STICKY RULES

Liminal law unsettles our understandings about what "law" is. Liminal law creates powerful law-like rules when traditional law is stymied. It can establish a protective bubble for noncitizens, as DACA and administrative closure have done, or girder a national mass deportation program, as the mandatory detainer did for Secure Communities.[301] Yet liminal law is not manifestly "law." This Section explores where liminal rules fall in the legal lexicon: whether they

296. Padilla v. Kentucky, 559 U.S. 356, 361–62 (2010).

297. *Id.* at 362.

298. *Id.* at 363 (citing generally Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified at scattered sections of 8 U.S.C.)).

299. *See id.* at 374 n.15 (noting that "many States require trial courts to advise defendants of possible immigration consequences" and citing relevant state statutes); *id.* at 367–68 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.").

300. *Id.* at 364, 373–74 (citing Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 130 (2009) (concluding that under the Sixth Amendment, defense counsel has "a duty to warn defendants about consequences such as mandatory deportation")).

301. *See supra* Section I.B.2 and Part III (describing the impact of DACA and Secure Communities).

constitute positive "hard" law,[302] soft law, [303] or are instead law-adjacent, like social norms or discrete exercises of discretion.[304]

Law can be seen as a spectrum, with "hard" or positivist conceptualizations of law at one end, "soft law" in the middle, and social customs on the other end.[305] Liminal law is less formal and more opaque than traditional "hard" or positivist forms of law but more robust than social norms.[306] It straddles the points on the spectrum between hard and soft law.

"Hard" or positive law consists of traditional governmental rulemaking procedures and outcomes. Positivist concepts of law have tended to examine whether a rule represents a sovereign command backed by the threat of some sanction[307] or whether it comports with a "rule of recognition" of a legal system that would compel officials and individuals to defer to it.[308] Statutes, regulations and precedent best exemplify positive law because of their binding nature and the clarity of their relationship with a lawmaking authority. Positivists distinguish these accounts of "hard" law from customs or social mores that arise from broad acceptance and practice by most members of the community but do not constitute "law."[309]

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302. *See supra* notes 292–95 and accompanying text.

303. *See supra* note 29 and accompanying text.

304. *See* H.L.A. HART, THE CONCEPT OF LAW 86–91 (3d ed. 2012); ERIC A. POSNER, LAW AND SOCIAL NORMS 8 (2000) (defining social norms as "behavioral regularities that emerge and persist in the absence of organized, conscious direction by individuals").

305. *See* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–15 (2010) (collecting scholarship and noting that "[t]here is considerable disagreement in the existing literature on their definitions," and that "[m]any legal scholars use a simple binary binding/nonbinding divide to distinguish hard from soft law"); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579 (2008) (describing "soft law as a rule issued by a lawmaking authority that does not comply with constitutional and other formalities or understandings that are necessary for the rule to be legally binding" (emphasis omitted) (footnote omitted)).

306. *See* POSNER, *supra* note 304, at 8 (defining social norms).

307. 3 JOHN AUSTIN, LECTURES ON JURISPRUDENCE: SEQUEL TO THE PROVINCE OF JURISPRUDENCE DETERMINED 399 (1863) (expanding upon the legal positivist theories and positing that law consists of sovereign commands, backed by the threat of force or sanction); HART, *supra* note 304, at 50–51, 86–88; Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 21 (1967) (describing the rule of recognition as "a fundamental secondary rule that stipulates how legal rules are to be identified").

308. HART, *supra* note 304, at 94; Dworkin, *supra* note 307, at 21. Hart theorized that each legal system is underlain by what he called a "rule of recognition" that sets the criteria for the validity of legal rules within that system. HART, *supra* note 304, at 91, 94. "Any norm that bears one of the marks of authority set out in the rule of recognition is a *law of that system*" and officials must "recognize it when carrying out their official duties." Scott J. Shapiro, *What Is the Rule of Recognition (And Does It Exist?), in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 238 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); SCOTT J. SHAPIRO, LEGALITY 118–20 (2011) (arguing that legal authority depends on "whether the relevant officials of that system accept a plan that authorizes and requires deference to [a particular] body").

309. HART, *supra* note 304, at 50–56, 86–88.

Liminal immigration rules function similarly to positive law, and they share a capacity for widespread impact. It is the similarity to positive law that makes liminal rules potent, leading law enforcement agencies to proceed as if the detainer were mandatory and sowing the impression that DACA originated from a presidential executive order.[310] Like positive law, liminal immigration rules originate from a sovereign, often in the form of an administrative agency such as DHS, as the examples of the mandatory detainer rule and DACA illustrate.[311] Still, liminal legal rules trouble the borders of positive law. The controversy over DACA has tended to be framed as a question of its validity as law, as an overreach of executive power.[312] These arguments essentially assert a failure to comply with the formalities necessary for recognition as law.[313]

Moreover, there is no formal sanction resulting from failure to obey the liminal command. An officer's failure to heed a detainer results in no sanction on the individual level (though powerful social norms may place pressure on sheriffs and police officers to comply).[314] A USCIS official's erroneous DACA denial does not lead to a formal sanction for the official and there is no internal or external appeal, other than filing a new DACA petition.[315] If the "sanction" is the "key to the science of jurisprudence," as John Austin claimed,[316] then liminal rules fail this aspect of positive law.

Yet liminal immigration law is quite distinct from the customs or social mores that populate the other end of the legal spectrum.[317] Instead, liminal law shares much with soft law—sub-regulatory administrative rules that are

310. *See supra* Section II.A.1.

311. *See* COX & RODRÍGUEZ, *supra* note 176, at 178–79.

312. *See supra* Section II.A.1.

313. *See* Gersen & Posner, *supra* note 305, at 579.

314. *See* ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 21–26 (2009) (discussing the benefits and costs from the perspective of law enforcement officials of participating in federal immigration enforcement, including reduced jail population, detention costs, and access to federal databases); Karen L. Amendola, Kristin N. Williams, Edwin E. Hamilton & Veronica Puryear, *Appendix H: Law Enforcement Executive Views: Results from the Conference Survey*, *in* ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 180, 182 (Police Found. ed., 2009) (reporting that a survey of executive law enforcement officials indicated that local-level immigration enforcement "would appease supporters in the[ir] communit[ies]"); *see also* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 830–33 (2015) (noting that ICE benefits by delegating enforcement responsibilities to local police, including conservation of time and money and the legitimating effect of framing immigration enforcement actions as targeting "criminal aliens").

315. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., FREQUENTLY ASKED QUESTIONS (2022), https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions [https://perma.cc/C2SL-44R8] ("Q26: Can I appeal USCIS'[s] determination? A26: No. You cannot file a motion to reopen or reconsider and cannot administratively appeal the decision if we deny your DACA request." (emphasis omitted)).

316. JOHN AUSTIN, LECTURES ON JURISPRUDENCE: THE PHILOSOPHY OF POSITIVE LAW 11 (Robert Campbell ed., 1875).

317. *See* HART, *supra* note 304, at 86–91; POSNER, *supra* note 304, at 8.

not formally binding but nevertheless manage the exercise of government authority.[318] Soft law takes many forms: agency manuals, memoranda, protocols, guidelines, correspondence, and employee handbooks and training materials, among others.[319]

In this sense, DACA, the detainer, administrative closure, and similar liminal rules exhibit attributes of "soft law."[320] DACA's origin as a speech and an agency memo square with soft law in that DACA is framed as an exercise of discretion and not as a binding regulation.[321] The origin of the detainer's mandatory nature was not the statute or regulation governing detainers but the practices of law enforcement and immigration officials and the language of the form.[322] Administrative closure as a form of relief from removal arose from an agency memo and administrative precedent that channeled agency discretion.[323]

Liminal law, though, is a harder form of soft law. The stickiness of liminal law extracts it from the mainstream of soft law. Soft law can be powerful and influential, but it is vulnerable to revision or elimination due to a change in policy or administration.[324] In fact, that flexibility is one of its advantages. The stickiness of liminal immigration law, coupled with its robustness, gives it a harder edge and the greater stability it shares with positive law, as further described below.[325] In sum, liminal law stands with one foot in hard law and the other on the firmer edge of soft law. This state of being between positive law and soft law leaves these rules in a liminal space, occupying the threshold

318. David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 195 n.469 (2018) ("[S]oft law . . . refer[s] to government policies that are not formally binding but that nevertheless control or influence how government authority is exercised."); *see also* Lorne Sossin & Charles W. Smith, *Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government*, 40 ALTA. L. REV. 867, 869 (2003) ("Soft law cannot in theory bind decision-makers, yet in practice it often has as much or more influence than legislative standards.").

319. *See* Sossin & Smith, *supra* note 318, at 871.

320. *See* Rubenstein, *supra* note 318, at 195 n.469 ("DACA and DAPA would fall into the category of soft law because they were formed outside of notice-and-comment rulemaking procedures, and they ostensibly do not create rights or duties."); Alexander Betts, *Soft Law and the Protection of Vulnerable Migrants*, 24 GEO. IMMIGR. L.J. 533, 536 (2010) (arguing "for the development of a soft law framework [for] the protection of vulnerable [undocumented] migrants").

321. *See* Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 382–84 (2017) [hereinafter Chen, *Administrator-in-Chief*] (characterizing the DACA, DAPA, and detainer "policies [as] issued through nonbinding policy statements and memoranda that can be collectively categorized as guidance; though they are sometimes layered atop existing regulations" (footnote omitted)); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 530–32 (2009) (discussing delegating authority and the consequences of giving immigration officials too much discretion). *See supra* notes 175–89 and accompanying text.

322. *See infra* Section III.B (describing the elements of the detainer as a liminal law and the role of the form).

323. *See supra* notes 145–49 and accompanying text.

324. *See* Rubenstein, *supra* note 318, at 195 n.469; Sossin & Smith, *supra* note 318, at 871.

325. *See infra* Section III.B.

between a traditional legal rule and the practice, policy, or a discretionary call of soft law.[326]

B. HOW: STICKINESS, PATH-DEPENDENCE, AND THE POWER OF THE FORM

1. Stickiness and the Role of Path-Dependence

At least as important as classifying liminal rules is understanding why they stick around even in the face of determined efforts to eradicate them. What explains the stickiness of liminal law? And why do some rules achieve stickiness when others do not? We offer intertwined explanations: Liminal immigration laws exhibit path-dependency, facilitated by the stickiness inherent in the process and staying power of the government form.[327]

Liminal rules, once firmly rooted, achieve path-dependence. As Oona Hathaway has described, "'path dependence' means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it."[328] Once a course of action has started down a track, the costs of reversal increase. Even when other choice points arise, "the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice."[329] As an examination of the case studies shows, liminal legal rules exhibit this resistance to reversal as a result of the social norms that grow up around liminal legal structures, the gravity and momentum that they acquire through

326. Ronald Dworkin's critique of legal positivism urged us to move past the idea that rules of law are validly recognized as "law . . . because some competent institution enacted them." Dworkin, *supra* note 307, at 41. Some legal principles, he argued, originate "not in a . . . legislature or court, but [rather] in a sense of appropriateness developed in the profession and the public over time." *Id.*

327. Other scholars have noted the stickiness of certain immigration doctrines and the role of path-dependence in creating that stickiness. *See* Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1715 (2009) (noting the stickiness of federal immigration policies and explaining that "continued genuflection to broad versions of federal immigration exclusivity reify the wide-latitude courts provide the federal government"); Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 161 (2012) ("[T]he [border] wall's physicality makes it particularly sticky public policy."); David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 987 (2016) ("Immigration constitutional doctrine tends to be sticky—in ways often unfavorable to immigrant interests, and difficult to undo."); *see also* Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1300 (2012) ("[Q]uotas for temporary employment visas are in practice quite sticky.").

328. Hathaway, *supra* note 234, at 603–04; Varol, *Constitutional Stickiness*, *supra* note 234, at 910 (explaining that path-dependence means that "each stage of historical development constrains the next stage in the temporal sequence and stimulates movement in the same direction"); Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 292–93 (2014) (analyzing the relationship between path dependence and temporary law).

329. Margaret Levi, *A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis*, *in* COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE 19, 28 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997).

usage over time, and the deepening reliance on them by individuals and institutions.[330]

The survival of the original grant of DACA resulted from path-dependence. The creation in the DREAM Act of a category of people defined by youth, length of residence in the United States, and lawful conduct led to the appearance of a very similar category in DHS's Morton memo deprioritizing deportation of that group, followed by the reappearance of similar criteria in the Napolitano memo establishing DACA and crystallizing the do-not-deport rule.[331] The creation of a system and a form to process DACA applications solidified the path.[332] That path led to a growing population of DACA recipients with access to work authorization, then to an expanding number of employers reliant on DACA holders with work authorization, and to public recognition of DACA holders as a group.[333] People with DACA held jobs, went to school, and frequented banks and other institutions.[334] In many cases, their communities formally recognized their membership through legal rules like state laws and local ordinances.[335]

DACA illustrates that once a liminal rule takes hold, institutions, individuals, employers, and social networks shift their practices. Patterns of behavior and interactions take root between these institutions, employers, and social networks based on the liminal rule. The passage of time and the accumulation of decisions made DACA's liminal rule hard to reverse or modify.[336] This accumulation of actions, decisions, transactions, and interactions established the long path through which DACA had traveled by the time a new presidential administration attempted to terminate it. That pathway mattered when officials sought to rescind DACA.[337] Undoing DACA meant more than just re-imposing the immediate threat of deportation that DACA recipients had been subject to. It meant removing employees from employers, invalidating driver's licenses and identification cards, destabilizing bank

330. *See* Hathaway, *supra* note 234, at 622–27.

331. *See supra* Section I.B.1.

332. *See supra* Section I.B.1.

333. Burciaga & Malone, *supra* note 8, at 1096 (collecting studies and positing that "research has shown significant economic and social gains for eligible undocumented young adults" since DACA's introduction in 2012).

334. *Id.* at 1104–07 (reporting the results of a study of the educational, economic, and emotional gains respondents made because of the DACA program and the impacts of its rescission, pointing to educational achievements, financial stability, and employment).

335. *See id.* at 1096.

336. *See* Texas v. United States, 50 F.4th 498, 531 (5th Cir. 2022) (staying the vacatur of DACA as to current recipients due to its "profound significance to recipients and many others in the ten years since its adoption").

337. *See supra* Section II.B.1 (detailing attempts to rescind DACA); *see also* René Galindo, *The Functions of Dreamer Civil Disobedience*, 24 TEX. HISP. J.L. & POL'Y 41, 41–43 (2017) (describing Dreamers' engagement in civil disobedience).

accounts, and undermining state and local laws and ordinances.[338] It required stripping away the acquired legitimacy of a highly visible, sympathetic group of noncitizens.[339]

DAPA stands as an important counterpoint to the stickiness of DACA. In contrast to DACA, DAPA's do-not-deport rule for the parents of U.S. citizens and lawful permanent residents never acquired the path-dependence that would have resisted its downfall. Despite the possibility that DAPA would have manifested the characteristics of a liminal rule, DAPA was arrested before it could start down the path to robustness as a liminal rule.[340]

The mandatory nature of the detainer's do-not-release rule illustrates a similar path-dependence. The do-not-release rule came into being through the accretion of scores of state and local law enforcement officials heeding scores of requests by ICE officials using a form that simulated a criminal warrant. At some point along this path, it achieved the acceptance and practice

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338. *See* Burciaga & Malone, *supra* note 8, at 1104–07; *see also* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–14 (2020) (discussing the Duke Memorandum's failure to consider reliance interests in DACA (citing Duke Memo, *supra* note 108)).

339. Rescinding DACA may also have triggered a psychological heuristic called loss aversion bias that biases individuals against accepting decisions when they are presented as taking away a possession or a privilege. *See* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1503–04 (1998). Our assessments of the fairness of an action depends in part on whether we perceive the action as declining to provide something to someone versus taking away something they appear to possess. *See id.* (discussing decision-making biases in law including loss aversion bias and noting the common "tendency . . . to weigh losses more heavily than gains"); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 752 (1990) ("Loss aversion refers to the fact that people ascribe additional negative value to an outcome if it represents a negative change from the status quo." (emphasis omitted)); Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 866 (2012) (applying loss aversion bias to international refugee law and observing that depriving someone of a benefit they already have, such as removing a noncitizen from a country, is more likely to be perceived as a loss than denying someone a benefit they do not have, such as denial of a visa); *see also* Varol, *Constitutional Stickiness*, *supra* note 234, at 904–05 (applying loss aversion bias to path-dependence in the context of constitutional stickiness). If DACA is perceived as belonging to the recipient or as a benefit to the community or the nation, rather than conferring a new privilege, loss aversion bias may trigger the perception that rescission is unfair. *See* Zamir, *supra* at 866.

340. The do-not-deport rule for parents of U.S. citizens and lawful permanent resident children exists in some forms outside of DAPA. Cancellation of removal for nonpermanent residents applies to parents whose removal would result in exceptional and extremely unusual hardship to a U.S. citizen or to lawful permanent resident family members—a high standard. *See* Immigration and Nationality Act § 240A(b) (as amended 2022); 8 U.S.C. § 1229b(b). The rule finds purchase in other administrative actions too. In 2021, the Biden Administration issued a memo declaring that cases of immediate relatives of military members and individuals with serious physical or mental illnesses "generally will merit dismissal in the absence of serious aggravating factors." Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Att'ys 9–10 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [https://perma.cc/3YMH-WFLB]. While these differ substantially from deferred action under DAPA, they illustrate that DAPA's rule protecting certain parents from removal can manifest in liminal ways in other contexts.

of a customary norm within the community of law enforcement officials.[341] Once Secure Communities rolled out across the country, ad hoc practices of issuing individual detainers evolved quickly into systematized application of the mandatory detainer rule.[342]

That initial move set the mandatory detainer rule on a path down which it continued despite constitutional obstacles and substantial community pressure to resist it. As the use of detainers spread, the practice solidified relationships between police and ICE in jurisdictions in every state.[343] Habits and practices of joint enforcement rose up around detainer use.[344] Police work was re-envisioned as immigration enforcement work, fashioning a hybrid world in which administrative immigration enforcement melded into crimmigration law enforcement.[345] Those relationships, habits, and practices wore a path that survived the formal termination of the Secure Communities program and resisted the "sanctuary" policies of state and local jurisdictions.[346] Even as case law holding that the mandatory detainer rule was inconsistent with the Tenth and Fourth Amendments accumulated,[347] many jurisdictions continued to heed the detainers and some passed laws requiring or permitting local law enforcement to respond to them.[348] Again, like DACA, the passage of time and the accretion of relationships, practices, habits, and the multiple variations of the detainer form moved the detainer rule further down a path that resisted alteration.

Administrative closure similarly achieved stickiness through path dependence. It transitioned beyond mere recognition of its existence and examples of its application to acquiring the contours and criteria through precedent and practice that gave it the character of a functional rule. Over time, a process for seeking administrative closure grew up around the rule:

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341. *See supra* Section II.A.2 (describing some origins of the mandatory detainer rule).

342. *See* Lasch, *Rendition Resistance*, *supra* note 9, at 154–63 (describing the rise and fall of Secure Communities); *see also* 8 U.S.C. § 1254a(b)(1)(A)–(C) (describing when the Attorney General does not return individuals).

343. *See supra* notes 213–14 and accompanying text (describing increasingly intertwined roles of federal immigration agents and state and local police).

344. *See supra* Section II.A.2; Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1093–94 (2004) (discussing 1996 legislation that empowered state and local law enforcement officials to arrest and detain immigrants); Lasch et al., *Understanding "Sanctuary Cities,"* *supra* note 127, at 1722 (describing increase in cooperation between local police and federal immigration officials after 9/11).

345. *See supra* notes 203, 206–07 and accompanying text.

346. For a similar analysis relating to immigrant detention, see Alexandra Olsen, Note, *Over-Detention: Asylum-Seekers, International Law, and Path Dependency*, 38 BROOK. J. INT'L L. 451, 479 (2012) ("[T]he presumption in favor of detention might now be locked-in because it is easier to continue using it than to alter infrastructure and training to facilitate eliminating it.").

347. *See* Mayorkas Prosecutorial Discretion Memo, *supra* note 128, at 2–4 (tracing challenges to the mandatory detainer).

348. *See* City of El Cenizo v. Texas, 890 F.3d 164, 185–90 (5th Cir. 2018) (describing trend toward local continuance of detainers, including Texas Senate Bill 4).

practice advisories for motions to seek closure, a template for ICE to make a joint motion for closure, and the weight and momentum of long use.[349] Together, these set administrative closure on the path to liminality.

2. Stickiness and the Power of the Form

Government forms are a main ingredient in the stickiness of liminal legal rules. In the absence of a statute or regulation, immigration practitioners and officials use a form to carry out the work that a statute or regulation would do. With both DACA and the detainer, the power of the humble government form determined which agency mission would be primary.[350] It also settled which immigration orientation was at play—integration versus enforcement or regulatory versus crimmigration.

For DACA, the form served two functions: Its criteria set apart a group of people who the law otherwise treated as indistinguishable from other deportable noncitizens.[351] DACA then reclassified that group as non-deportable.[352] Thus far, this was nothing new. The predecessor to DACA—the DHS memos setting priorities for deportation—had defined this same group and similarly sought to protect them from deportation.[353] The memos failed to prevent immigration arrests of group members, perhaps because the memos were in tension with the agency's perceived mission of maximizing removal of deportable noncitizens.[354]

What was new was shifting the responsibility for protecting that group from the deportation agencies within DHS to the benefits-granting authority of USCIS. DACA created a process for obtaining a liminal status and embodied that process in the language that benefits-granting administrative agencies speak: an application form.[355] Processing benefit forms is the bread and butter

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349. *See supra* note 135 and accompanying text; Rabin, *supra* note 15, at 582 (reporting that administrative closure was widely used during the Obama Administration, increasing by 18,000 from 2013 to 2016).

350. Because administrative closure occurs in the course of agency adjudication, it has no official government form.

351. *See supra* Section I.B.1 (describing the impact of DACA on deportable noncitizens).

352. *See supra* Section I.B.1 and accompanying text; *see also* Texas v. United States, 50 F.4th 498, 508–09 (5th Cir. 2022) (concluding that more than one million people fell under DACA's protection).

353. *See* DACA Memo, *supra* note 100, at 2–3.

354. *See* Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 437, 496–98 (2022) (identifying DREAMers—with and without criminal convictions—who were deported after the 2011 Morton Memo was issued). *See generally* UNITED WE DREAM, DEPORTATION DEFENSE: A GUIDE FOR MEMBERS OF CONGRESS AND OTHER ELECTED OFFICIALS (2014), https://unitedwedream.org/wpcontent/uploads/2017/10/Deportation_Defense_Guide_2014.compressed.pdf [https://perma.cc/2VYG-749W] (providing case studies of noncitizens, including DACA recipients or those eligible for DACA, who were arrested despite matching the "low priority" categories in the Morton memos).

355. *See supra* notes 179–80 and accompanying text (describing the form used to confer DACA status).

of USCIS's day-to-day work.[356] Unlike directing ICE agents not to act, the USCIS DACA form was completely consistent with USCIS's typical operations.[357] The form translated the memorialized statements of the DHS Secretary and President into something practitioners could use to shift their clients to a more protected legal space.

Like DACA's application form, the immigration detainer form was central to the construction of the mandatory do-not-release rule. This process—an immigration agent's selecting of an individual noncitizen, completing a form marking out reasons for retaining custody, transmitting the form to the state or local criminal law enforcement agency, and the local agency's compliance via continuation of custody—repeated infinitely nationwide. It established a pattern of compliance with the detainer form.[358] It cemented a habit of obedience by nonfederal criminal law enforcement agencies to a federal administrative agency.[359]

The detainer form, Form I-247, made the mandate to detain tangible for police and jailers. Receiving an official form from a fellow law enforcement officer seemed to transmit that ICE agent's authority to maintain custody for immigration purposes to the state or local official. This penumbra of federal immigration authority seemed to exempt local police from the Fourth Amendment requirements for probable cause of a crime or judicial review before issuance.[360]

3. Stickiness in Theory and Operation

Several theories illuminate how stickiness operates to enable liminal law. Liminal law illustrates what David Schraub has described as a sticky slope.[361] A sticky slope arises when victory at one stage of pursuing a social or policy change leads to resistance that slows later movement toward the goal.[362] For those pushing for more restrictive immigration policy, the defeat of the DREAM Act was a victory, but one that led the newly defined group of resident

356. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., ALL FORMS, https://www.uscis.gov/forms/all-forms [https://perma.cc/FQ6T-N23D] (linking to online forms); *see also* COX & RODRÍGUEZ, *supra* note 176, at 177–80 (describing the role of USCIS in implementing DACA).

357. *See* COX & RODRÍGUEZ, *supra* note 176, at 177–80.

358. *See* Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 16–20 (2019) (explaining how the federal government might interact with local police).

359. *Id.*; *see* Lasch, *Rendition Resistance*, *supra* note 9, at 209 (confirming that forms issued for detainers after 2011 compelled local law enforcement to detain noncitizens).

360. *See* Lasch, *Rendition Resistance*, *supra* note 9, at 222–23 (concluding that ICE does not hold itself to Fourth Amendment probable cause and notice requirements).

361. *See* David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1256 (2013) ("A sticky slope exists whenever, in the course of pursuing an array of goals, the achievement of one victory makes it more difficult for the movement to attain others—where a victory at one stage helps presage a defeat at another.").

362. *Id.* at 1256.

immigrant youth to press the executive branch for an administrative solution. That became DACA's do-not-deport liminal rule.[363]

Similarly, the judicial blow that the *Miranda-Olivares* case struck against the mandatory detainer, which was the result of years of immigrant advocacy, inspired the rise of sanctuary jurisdictions that rejected detainers. Those jurisdictions ultimately became the target of the Trump Administration's attempt to resurrect the mandatory detainer rule.[364] With administrative closure, the Trump Administration's act of stripping from the immigration courts the long-held power to put cases on hold led not only to a reversal of that decision and a revival of the immigration courts' administrative closure discretion but also triggered a rulemaking to codify the closure power.[365]

The sticky slope phenomenon pairs with an "endowment effect" that furthers the development of liminal rules. David DePianto theorizes that the stickiness of a legal rule results in large part from benefits that accrue over time from complying with the rule.[366] These benefits gain value to the holder once they have "complied with a law, received some associated benefits, and grown attached to such benefits."[367] This "endowment effect" means that the complier values the benefits of complying with the rule, leading to path-dependence and further compliance.[368]

The endowment effect was central to the defense of DACA in *Texas v. United States*. The federal government argued that complying with DACA had led to benefits to the DACA recipients but also to family and associates, employers, states, and the national economy which, according to amici, could drop by as much as $460 billion without DACA.[369] In determining that DACA was a substantive rule for purposes of the APA, the Fifth Circuit concluded that "DACA is of enormous political and economic significance to supporters and opponents alike."[370] The court's decision to leave DACA in place pending Supreme Court review rested on these accrued benefits, pointing to findings that "[h]undreds of thousands of individual DACA recipients, along with their employers, states, and loved ones, have come to rely on the DACA program."[371]

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363. *See supra* notes 94–102 and accompanying text.

364. *See* Kahan, *supra* note 233, at 607–09 (arguing that lawmakers should apply "gentle nudges" rather than "hard shoves" when legislating in order to avoid law enforcement resisting the changes due to sticky societal norms because the resistance reinforces the societal norms lawmakers are trying to change).

365. *See* NEAL, *supra* note 163, at 4 & n.4 (issuing interim policy "pending the promulgation of a regulation addressing administrative closure").

366. David E. DePianto, *Sticky Compliance: An Endowment Account of Expressive Law*, 2014 UTAH L. REV. 327, 330, 356–58.

367. *Id.* at 330.

368. *See id.* at 356–58.

369. Texas v. United States, 50 F.4th 498, 524, 527 (5th Cir. 2022).

370. *Id.* at 527.

371. *Id.* at 530 (alteration in original) (citation omitted).

C. WHY: FLEXIBILITY, LEGITIMACY, STABILITY

Why does liminal law exist? This Section posits that liminal immigration fulfills three functions. It adds flexibility when a legal field ossifies, bolsters the legitimacy of a course of action, and creates stability for those whom the liminal rule governs.

1. Flexibility

Liminal law provides some flex in the joints of a calcified area of law. Immigration law is simultaneously hard to change and under tremendous strain due to its prominence on the political stage, its centrality to the economy, and the racialization of immigration enforcement.[372]

When the traditional means of revising immigration law encounter insurmountable obstacles that block iterative policy change, liminal law provides flexibility which can relieve the pressure for change.[373] This flexibility flows from the fact that liminal law is easier to create and modify than traditional law, with its procedural hurdles to revision and retraction.[374] Procedural requirements, such as notice and comment, precede amendment or repeal of regulations,[375] and stare decisis and deference doctrines slow the development of case law.[376] Liminal law arises outside of these well-marked pathways, facilitated by the notion that administrative actions flow to the path of least resistance. That is, if regulations in controversial areas are hard to promulgate or vulnerable to challenge, then agency actions will take an easier (though less durable) pathway,[377] in the form of policy memos, devolution of discretion, or administrative forms.[378]

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372. *See supra* Section I.A (discussing the ossification of formal immigration law).

373. *See* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628–39 (1997) (describing "steam-valve" federalism in the immigration law context).

374. *See* U.S. CONST. art. I, § 7.

375. Administrative Procedure Act (APA), 5 U.S.C. § 553; *see id.* §§ 556–57.

376. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014) (stating that any departure from stare decisis requires special justification); Payne v. Tennessee, 501 U.S. 808, 827 (1991) (stating that "stare decisis is the preferred course" of action because it maintains judicial integrity and promotes consistent developments in the law (emphasis omitted)); Chae Chan Ping v. United States, 130 U.S. 581, 600–01 (1889) (deferring to the legislature in decisions affecting immigration and foreign policy).

377. Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 60 (2019) (noting "that [agency] guidance can be produced and altered at greater speed, in higher volume, and with less accountability than legislative rules can" and that "[t]he justification for this procedural looseness is that guidance, unlike a legislative rule, is not supposed to be binding on the agency or the public").

378. Observers of immigration law in particular have critiqued the lack of transparency of the body of informal agency rules governing immigration in the United States. Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and* Not Really *Binding Rules*, 47 U. MICH. J.L. REFORM 1, 10 (2013) ("USCIS operates under a mass of guidance documents that are not particularly visible."). Family has roundly critiqued USCIS's reliance on guidance documents, asserting that "USCIS does not adequately explain what guidance

Liminal law thus has important implications for advocacy. Immigration advocacy can be both the parent and the offspring of liminal law. Pressure for legal innovation, for expanded pathways to lawful status for undocumented immigrants, or for expansion of enforcement methods may trigger a transformative moment in immigration law. As Jennifer Chacón points out, rights-protective advocacy tends to work against a backdrop of merely skeletal constitutional rights.[379] Activism on behalf of noncitizens has had to innovate, perhaps by drawing in rights and principles from mainstream areas of law,[380] or "engag[ing] in political acts that assert previously unacknowledged rights into existence."[381] After the DREAM Act failed, the activism of immigrant youth created public pressure to fashion a new solution, one that used an old tool—deferred action—to address a new situation.

But the flexibility that liminal rules provide is not confined to rights protection. The immigration detainer's do-not-release rule arose under circumstances in which state involvement in immigration enforcement had little constitutional grounding.[382] Yet the detainer's mandatory do-not-release rule created a new way for ICE to seize noncitizens in criminal custody.[383]

While flexibility may be important when traditional law ossifies, the flexibility of liminal law strikes an undemocratic note. Crafting law-like rules outside of the traditional lawmaking processes seems unpredictable and opaque. The very liminality of these rules makes them hard to recognize or challenge via judicial review or legislative command. To the extent that liminal rules rely on path-dependence, they become difficult to unravel. Liminal law may also ease pressure for needed legal reform that would otherwise come through traditional, more transparent processes like enacting legislation or promulgating regulations. If liminal law is easier to create and revise than the more traditional sleeves for legal rules, it raises the prospect of an administrative state governing largely through liminal law.

One response to this critique is that liminal rules are not true substitutes for traditional law. Liminal rules like DACA did not fully address the call that

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documents are, their effects, or how it formulates them" and that "USCIS has underused notice and comment rulemaking, has altered major adjudicatory standards through guidance documents, and has failed to set clear expectations for the effect of guidance documents before its administrative appellate body." *Id.*; *accord* Family, *Administrative Law*, *supra* note 74, at 593–99 (discussing the way USCIS has approached guidance documents).

379. Chacón, *Producing Liminal Legality*, *supra* note 7, at 764.

380. *See* Motomura, *Phantom Constitutional Norms*, *supra* note 76, at 549–50.

381. Chacón, *Producing Liminal Legality*, *supra* note 7, at 764–65.

382. *See* Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893) (holding that the Constitution grants the federal government power to regulate issues involving foreign relations, including "naturalization" and immigration); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1600–08 (2008) [hereinafter Stumpf, *States of Confusion*] (analyzing the tension between the "domestication of immigration law," constitutional preemption, and equal protection).

383. *See supra* Section I.B.2 (describing development of ICE detainers).

immigrant youth made for stable, long-term status. Instead, it created a liminal status[384] or a non-status.[385] And the liminal rule itself was precarious, battered by executive and judicial attempts to terminate it. The mandatory detainer rule, lacking the anchor of a statute or regulation, similarly foundered in the face of administrative attempts to shut it down and a series of court challenges to its constitutionality and legitimacy. These disadvantages are not about the content of the rule. They are inherent in the liminal nature of liminal law.

2. Legitimacy

Liminal law can also imbue people, processes, and actions with legitimacy. The criteria for the detainer and for DACA accomplished something more than creating liminal rules. They created a foundation for legally recognizing the legitimacy of the individual or the agency's immigration-related action. DACA has a collateral consequence that is law-like: It has power to shift perceptions about legitimacy.[386] Legal rules have moral force. They can counteract perceptions that actions—or individuals—are illegitimate, such as when criminal laws are passed or repealed, or same-sex conduct declared lawful.[387] DACA counteracts the illegitimacy of unlawful presence by shifting undocumented youth from a category in which their presence itself is labeled as illegitimate to a newly defined category with attributes that resemble lawful status.[388] Together with the effect of integration into educational, economic, and social spheres, DACA holders as a group acquired substantial legitimacy in the public eye.[389]

Similarly, the immigration detainer boosted the legitimacy of something that had been in question: the role of state and local law enforcement in

384. *See* Chacón, *Producing Liminal Legality*, *supra* note 7, at 725.

385. *See* Heeren, *supra* note 7, at 1181.

386. *See* Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the Dream Act*, 91 TEX. L. REV. *SEE ALSO* 59, 67–68 (2013).

387. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576–79 (2003) (holding that criminalizing consensual same-sex conduct violates the Due Process Clause).

388. *See* Chacón, *Producing Liminal Legality*, *supra* note 7, at 719 (observing that DACA, and DREAMers' own political agitation, allowed DREAMers to "move[] out of the shadows" and "demonstrate[] levels of belonging, political participation, and social influence that are often thought to be limited to formal legal citizens"); Heeren, *supra* note 7, at 1178 (noting that "[n]onstatus [could] . . . be a way station en route to status" for DREAMers).

389. *See supra* note 388. This legitimacy-enhancing aspect of DACA may have the undesired effect of deepening an artificial divide between the "good" and the "bad" immigrant. *See* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 221 (2012) (noting "an unintended cost to the advocacy that accompanies the 'good immigrant' laws" like the DREAM Act or DACA, that "[b]y putting forward only blameless victims of others' acts (parents who brought children across the border, abusers, foreign persecutors, traffickers), advocates inadvertently set an exceptionally high bar for who merits membership in American society").

immigration law. Deportation and exclusion are administrative proceedings.[390] Outside of immigration law, police involvement in administrative proceedings is exceptional.[391] The detainer form, despite being issued by an administrative agency for civil detention, was clothed with authority. It bore the icon of a federal agency and a bolded imperative exhorting the police to detain a suspected lawbreaker. The form purported to imbue the receiving police officer or sheriff with that authority, creating the appearance of legitimacy for the mandate to shift individuals to administrative immigration custody. The widespread use of the mandatory detainer in the Secure Communities program legitimized the involvement of state and local law enforcement in the deportation process. In turn, the connection between police and immigration law aligned deportation more closely with criminal law enforcement.

3. Stability

Liminal rules can have a stabilizing influence on an area of law. Aaron Nielsen, responding to critique that administrative rulemaking should be streamlined, has countered that "sticky" regulations have a stabilizing effect on regulated entities.[392] When "regulated parties know that an agency must survive a procedural gauntlet to change a regulatory scheme," he says, "they can have more confidence in that scheme's stability."[393]

This seems true of liminal immigration law, at least to some extent. DACA and administrative closure mitigated the threat of deportation for millions of noncitizens.[394] Administrative closure permitted innumerable noncitizens to pursue more stable immigration status outside of the deportation process. With the threat of deportation at least temporarily at bay, these noncitizens could participate more openly in their communities.

These liminal states of being are by nature precarious.[395] They nevertheless offered more stability for integration via work, education, and other activities than the extreme precarity of undocumented life. Because

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390. *See* Wong Wing v. United States, 163 U.S. 228, 231 (1896) (establishing that deportation is not criminal); Stumpf, *States of Confusion*, *supra* note 382, at 1574 (discussing the meaning of deportation and punishment depending on whether imposed in the "entry, exclusion, and deportation" context).

391. Exceptions include civil commitment and juvenile delinquency. *See* Jain, *supra* note 314, at 826–44 (identifying the impacts of data gathered during and after an arrest across a spectrum of noncriminal situations, including immigration); Mary Beth West, Note, *Juvenile Court Jurisdiction Over "Immoral" Youth in California*, 24 STAN. L. REV. 568, 578–81 (1972) (discussing police involvement in juvenile criminal and noncriminal cases in California).

392. *See* Nielson, *supra* note 234, at 87–90, 136–37 (summarizing commentary on the "ossification" of administrative rulemaking and the critique "that there are too many procedures and that administrative law should be transformed to speed up the regulatory process").

393. *Id.* at 90.

394. *See supra* notes 330–35 and accompanying text (describing the impact of DACA on otherwise deportable noncitizens).

395. *See* Burciaga & Malone, *supra* note 8, at 1102 ("DACA was never a clean or complete break from the precarity of undocumented life.").

DACA was a grant of deferred action, it conferred work authorization and with that a form of identification necessary for the everyday functions of modern U.S. living: access to banking, drivers licenses, loans, credit building, and the Social Security system, among many others.[396] These collateral effects of deferred action made DACA recipients formally recognizable to institutions like banks, universities, employers, and state and local governments. It created stability not just for the DACA recipients but also for the individuals and institutions that dealt with and relied on them to work, study, and participate in the social and economic aspects of society.[397]

Administrative closure fostered stability on several levels. Certainly for the individual benefiting from it, achieving the non-status of administrative closure allowed for continued integration into the community in way similar to that experienced by DACA holders. And like DACA, the stability that administrative closure provided adhered to the family members, employers, institutions, and other community members. On another level, administrative closure contributes to the stability and legitimacy of immigration law itself when used to provide time for adjudication of admission applications or relief. In that circumstance, closure avoids the inconsistency of an order to remove a noncitizen who is simultaneously eligible for lawful status.

The form and processes surrounding liminal laws were critical ingredients in creating this stability. Housing the decision to provide forbearance from deportation in the benefits-granting agency fit USCIS's everyday work of creating stable immigration and citizenship status and benefits that underlie integration into society like work authorization and personal identification.[398] The process and the form together shuttled immigrant youth from the bailiwick of an agency whose everyday work was to delegitimize and deport noncitizens—ICE and CBP—to the agency whose mission was to further individual and societal stability through admission and benefits.[399]

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396. *Id.* at 1100–01 (collecting research showing that in the first year of DACA's "existence[,] . . . many DACA holders found new jobs, increased earnings, obtained driver's licenses, and opened bank accounts"). *See* 8 C.F.R. § 274a.12(c) (2022) (conferring on deferred action recipients the right to apply for work authorization from USCIS).

397. *See* Chacón, *Producing Liminal Legality*, *supra* note 7, at 719; Heeren, *supra* note 7, at 1132–33 (observing that many recipients of liminal status like DACA described receiving that "nonstatus" as "coming out of the shadows").

398. Chen, *Administrator-in-Chief*, *supra* note 321, at 385–86 (describing the DACA memo as "systematiz[ing] the process for considering deferrals by producing application forms and compliance manuals, and . . . creat[ing] service centers to process the applications"); COX & RODRÍGUEZ, *supra* note 176, at 177–80 (contrasting USCIS employees, who have as a core part of their mission the facilitation of immigration, with ICE employees who are "steeped in the attendant professional culture focused on rooting out and deterring legal violations").

399. Ming Chen points out that DACA and the detainer were part of the same administrative scheme to address unauthorized migration under the Obama Administration. *See* Chen, *Administrator-in-Chief*, *supra* note 321, at 381–82 (describing how "President Obama's deferred action policies tackled the undocumented immigrant population from two sides").

The mandatory detainer also created a form of stability in law enforcement relations, at least for a time. The widespread use of the detainer led to the normalization of police detention of noncitizens for administrative immigration violations.[400] It accustomed state and local law enforcement across the country to playing an adjunct role to immigration officials pursuing civil immigration violations such as unlawful presence.[401]

D. WHO: LIMINAL LAW FOR LIMINAL CLASSES

Who benefits from or is targeted by liminal law? Liminal law raises the specter of segregating law in ways that have a racial impact. Immigration enforcement and admissions laws apply unevenly to different racial groups.[402] DACA and the mandatory detainer rules exemplify this: DACA is disproportionately held by noncitizens of color, while a relatively smaller number of noncitizens of color immigrate through the admissions system.[403] Detainers hold undocumented noncitizens who are disproportionately of Latinx origin.[404] Their use facilitated the singling out of a particular racial group—Latinx members—for law enforcement, resulting in ballooning arrest

400. Miranda-Olivares v. Clackamas Cnty., No. 12-cv-02317, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (holding that "the Fourth Amendment applie[d] to [the] County's detention of Miranda-Olivares" and that the detention violated the Fourth Amendment); *see also* Lasch et al., *Understanding "Sanctuary Cities," supra* note 127, at 1758–61 (describing three lines of case law to illustrate judicial concern over unlawful arrests); Lasch, *Federal Immigration Detainers*, *supra* note 114, at 666–68 (discussing the "far reaching" implications of the Supreme Court's discussion of Fourth Amendment issues in *Arizona v. United States*).

401. *See* Lasch et al., *Understanding "Sanctuary Cities," supra* note 127, at 1730–33.

402. *See* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1583–86 (2011) (discussing "pretext and . . . specific racial profiling" employed by police and immigration officials); Chacón, *Producing Liminal Legality*, *supra* note 7, at 740–42 (discussing how "individuals . . . are[] profiled based on ethnicity and national origin" in immigration enforcement); Lasch et al., *Understanding "Sanctuary Cities," supra* note 127, at 1764–68 (discussing measures taken by some jurisdictions "to promote the equal protection of law" in light of the "heighten[ed] . . . risk of discriminatory policing" resulting from involving local police in immigration enforcement); Motomura, *The President's Dilemma*, *supra* note 173, at 25–26 (discussing how ICE's "case-by-case assessments" welcome the likelihood of bias); Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. SAINT THOMAS L.J. 532, 546 (2017) (discussing DHS's failure to address racial profiling in immigration enforcement); USCIS 2020 ENFORCEMENT AND REMOVAL REPORT, *supra* note 69, at 26–32 (showing rates of removals based on national origin from FY2018 to FY2020).

403. Rosenbaum, *supra* note 402, at 563–64 ("[C]riminal immigration policing . . . has resulted in disproportionate criminalization and deportation of Latina/os and persons of color."); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., APPROXIMATE ACTIVE DACA RECIPIENTS 1 (2017), https://www.uscis.gov/sites/default/files/document/data/daca_population_data.pdf [https://perma.cc/4JD5-PCBD] (showing that 79.4 percent of DACA recipients were born in Mexico).

404. *See* Chacón, *Producing Liminal Legality*, *supra* note 7, at 730–31 (establishing a connection between liminal vulnerability and race markers); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015), *reprinted in* 36 IMMIGR. & NAT'Y L. REV. 713, 716–18 (2015) (discussing "[d]isparities . . . between Latinos and other groups of the population in . . . detention and removal rates in the immigration system" (footnote omitted)).

and detention rates of Black and Latinx people.[405] And the practice of complying with detainers led to racial profiling not only by law enforcement officers who were specifically authorized to obey detainers, but also by police and sheriffs in jurisdictions surrounding those officers.[406]

These facts suggest that liminal law segregates law itself in racial ways. The most desirable immigration rules that endow noncitizens with stable legal status are statutory. These include the admissions provisions for lawful permanent residence through employment and family ties. These stable, statutory categories disproportionately benefit those of European descent.[407] Liminal laws such as DACA, the mandatory detainer rule, and administrative closure either provide only a half-step liminal status largely relegated to noncitizens of color or pave the way to expanding enforcement of immigration law by state and local criminal law enforcers. Combined with the disproportionate policing of communities of color in the United States that scholars and activists have brought to light, this racialized divide between protection from deportation and expanded immigration enforcement is especially fraught.[408]

CONCLUSION

Liminal law is humble in form and powerful in practice. It constitutes a tremendously influential means of governance. Liminal rules may arise from the declaration of an official, like the DACA program, or the creation of a form, like the ICE detainer form delivered to state and local officials. Yet they exert a power similar to that of traditional legal rules. They may prevent an

405. *See* Vázquez, *Perpetuating*, *supra* note 69, at 666 (observing that most removals based on criminal convictions are Latinx immigrants); GARCÍA HERNÁNDEZ, MIGRATING TO PRISON, *supra* note 69, at 73–74 (noting that most detained migrants are Latinx); Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, *in* THE JOURNAL OF AMERICAN HISTORY 18, 18 (2015) (noting that "[B]lack and Latin[x] [inmates] make up [seventy-two] percent of the federal prison population" as well as a "majority of . . . state prison populations"); SREENIVASAN ET AL., *supra* note 204, at 4 ("[T]he majority of detainers were issued to persons originating from Latin American countries.").

406. *See* Pham & Van, *supra* note 70, at 464–68 (documenting this phenomenon based on analysis of millions of traffic stops).

407. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010) (arguing that mass incarceration embodies a new form of racial discrimination); *see also* Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 25–26 (2011) (discussing need for "a multi-racial, multi-ethnic movement" to combat disproportionate policing of racial minorities).

408. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/N5D8-43CZ]; Deborah Barfield Berry, *They Overcame Police Dogs and Beatings: Civil Rights Activists from 1960s Cheer on Black Lives Matter Protesters Leading New Fight*, USA TODAY (July 6, 2020, 10:09 AM), https://www.usatoday.com/story/news/2020/07/03/civil-rights-black-lives-matter-protesters-build-1960-s-movement/5356338002 [perma.cc/YS3D-DZ9J]; Verena Daniel, *How the BLM Movement Compares to the MLK Jr. Era Civil Rights Movement*, STATE NEWS (Jan. 18, 2021), https://statenews.com/article/2021/01/blm-compared-to-mlk-era-civil-rights?ct=content_open&cv=cbox_latest [https://perma.cc/2PL6-VY3Z].

agency official from deporting a group of noncitizens or compel local jailers to keep a noncitizen in custody when their own authority expires. When the regulatory target of law itself is in flux, when the core activity of human social and economic interaction is liminal itself, changing as people change, as society changes, as economics change, liminal rules arise to flex the joints of legal change.